United States Court of Appeals

for the Second Circuit

APPENDIX

75-7538

B

United States Court of Appeals

For the Second Circuit

P/S

ALAN L. SPIELMAN,

Plaintiff-Appellant,

against

GENERAL HOST CORPORATION, RICHARD C. PISTELL, HARRIS J. ASHTON, C. WHITCOMB ALDEN, JR., JOSEPH P. BINNS, WILLIAM F. DOWNEY, WESTON E. HAMILTON, WILLIAM P. HOWE, JR., J. ELROY McCAW, EDWIN C. McDONALD, LESLIE W. SCOTT, ALLEN & COMPANY, INCORPORATED, ALLEN & COMPANY, KLEINER, BELL & COMPANY, INCORPORATED, SEYMOUR M. LAZAR, EUGENE V. KLEIN, ALLEN MANUS, CECIL MANUS, and GREAT AMERICAN INSURANCE COMPANY,

Defendants,

GENERAL HOST CORPORATION, RICHARD C. PISTELL, HARRIS J. ASHTON, C. WHITCOMB ALDEN, JR., JOSEPH P. BINNS, WESTON E. HAMILTON, LESLIE W. SCOTT, ALLEN & COMPANY, INCORPORATED, and ALLEN & COMPANY,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

UNITED STATES COURT OF APPEALS
FILED
DEC 23 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX

VOLUME I OF FOUR VOLUMES
(Pages JA1A to JA321)

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PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

Document	*Page*
Docket Entries	JA1A
Stenographer's Minutes	JA1
Amended Complaint	JA535
Answer of Defendant Richard C. Pistell	JA560
Answer of Defendant Allen & Company	JA570
Answer of Defendant Allen & Company, Inc.	JA573
Answer of Defendants General Host Corporation, Harris J. Ashton, C. Whitcomb Alden, Weston E. Hamilton, Joseph P. Binns, Leslie W. Scott, and William P. Howe, Jr.	JA576
Stipulation *re* Class	JA583
Order *re* Class	JA598
Proposed Findings of Fact and Conclusions of Law of Plaintiff	JA599
Proposed Findings of Fact and Conclusions of Law of Defendants (Pre-Trial)	JA626
Proposed Findings of Fact and Conclusions of Law of Defendants (Post-Trial)	JA632
Pre-Trial Order	JA648
Opinion of the District Court	JA699
Final Judgment	JA750
Notice of Appeal	JA754

EXHIBITS AT TRIAL

Plaintiff's Exhibit No.	*Description*	*Page*
1	Accounting Research Bulletin No. 51	JA757
4	Patterson Memo to Allen, Dated August 6, 1968	JA761
21(A)	Affidavit of Harris J. Ashton, Dated January 27, 1969 (pp. 60-61 of Appendix in *U.S.* v. *Swift & Company*)	JA764
21(B)	Comments of Counsel (p. 166 of Appendix in *U.S.* v. *Swift & Company*)	JA773
21(C)	Complaint in *U.S.* v. *Swift & Company*	JA774
21(D)	Petition for Injunction in *U.S.* v. *Swift & Company*	JA798
21(E)	Affidavit in Support of Petition	JA801
21(F)	Findings of Fact and Judgment Order	JA806
8	Confidential Report (cover and pp. 125-129)	JA814
23	General Host Corporation Prospectus, Dated January 30, 1969	JA820
24	Memo from Day to Ashton *re* cashflow, Dated January 30, 1969	JA896
25	McDowell EBT in *Armour* v. *Kelly*, p. 9, ll. 12-23	JA902
59	Allen & Company, Inc. Letter, Dated October 15, 1969	JA903
60	Allen & Company, Inc. Letter, Dated February 4, 1969	JA909
61	Revised Greyhound Tender Offer	JA910

Defendants' Exhibit No.	*Description*	*Page*
A-11	Letter from Kirkland, Ellis to SEC, Dated December 10, 1968	JA915
A-12	Letter from SEC to Sullivan and Cromwell, Dated December 12, 1968	JA918
A-13	Letter from Kirkland, Ellis to SEC, Dated December 16, 1968	JA919
A-15(1)	General Host Exchange Offer Announcement, Dated December 23, 1968	JA922
A-16	Article, Wall Street Journal, Dated December 24, 1968	JA923
A-18	Host S-1 Registration Statement	JA924
A-19	Exhibits to S-1 Registration Statement	JA1024
A-20	Article, Wall Street Journal, Dated December 24, 1968	JA1070
A-21	Sullivan & Cromwell Memo, Dated January 2, 1969	JA1071
A-22	Letter from Sullivan & Cromwell to SEC, Dated January 6, 1969	JA1082
A-23	Letter from Kirkland, Ellis to SEC, Dated January 6, 1969	JA1083
A-25	Advertisement, Wall Street Journal, Dated January 9, 1969	JA1084
A-26	Letter to Armour Shareholders, Dated January 9, 1969	JA1085
A-28	Letter from SEC to Sullivan & Cromwell, Dated January 17, 1969	JA1088
A-29	Armour Proxy, Dated January 17, 1969	JA1089
A-32	Letter from Kirkland, Ellis to SEC, Dated January 23, 1968	JA1095

Defendants' Exhibit No.	*Description*	*Page*
A-34	Letter from Sullivan & Cromwell to SEC, Dated January 24, 1969	JA1096
A-34(1)	Article, New York Times, Dated January 24, 1969	JA1097
A-35	Greyhound Tender Offer, Dated January 27, 1969	JA1098
A-37	Letter from Armour, Dated January 27, 1969	JA1102
A-42(A)	Complaint in *Armour & Co.* v. *General Host*	JA1106
A-42(B)	Transcript of Hearings Before Hon. Edward Weinfeld, on February 5, 1969	JA1130
A-42(C)	Opinion of Hon. Edward Weinfeld in *Armour & Co.* v. *General Host*	JA1307
A-43	Article, Wall Street Journal, Dated January 24, 1969	JA1326
A-44	Advertisement *re* Greyhound Offer, Dated 1/24/69	JA1327
A-45	Article in Wall Street Journal, Dated January 28, 1969	JA1328
A-46	Amendment No. 2 to S-1 Registration Statement, Filed January 29, 1969	JA1329
A-49	Dealer Management Agreement, Dated January 30, 1969	JA1406
A-50	Price Waterhouse Comfort Letter, Dated January 30, 1969	JA1413
A-51	SEC Order, Dated January 30, 1969	JA1415
A-54	Advertisement in Wall Street Journal, Dated January 31, 1969	JA1416
A-55	Letter from Greyhound to Armour Shareholders, Dated January 31, 1969	JA1418
A-56	Amendment #1 to Host S-1 Registration Statement	JA1422

Defendants' Exhibit No.	*Description*	*Page*
A-58	Letter from Sullivan & Cromwell to SEC, Dated February 6, 1969	JA1424
A-59	Advertisement *re* Greyhound Tender Offer, Dated February 6, 1969	JA1430
A-60	Letter from Sullivan & Cromwell to SEC, Dated February 7, 1969	JA1432
A-61	Connolly, Bove Opinion Letter, Dated February 7, 1969	JA1432
A-62	Article in Wall Street Journal, Dated February 7, 1969	JA1433
A-63	Letter from Greyhound to Armour Shareholders, Dated February 10, 1969	JA1434
A-64	Supplemental Armour Proxy Statement, Dated February 10, 1969	JA1435
A-65	Advertisement, Dated February 2, 1969	JA1443
A-67	Article in Wall Street Journal, Dated February 11, 1969	JA1444
A-68	Greyhound Notice to Armour Shareholders, Dated February 13, 1969	JA1445
A-89	Amendment No. 1 to Host S-1 Registration Statement (cover and pages 8 and 9 only)	JA1446

...STATES DISTRICT COURT

Jury demand date: JA 1A

...Class Action 4/2/74 - demand 3 pts for

TITLE OF CASE

...L. SPEILMAN,

Plaintiff,

gainst-

...HOST CORPORATION,
... C. PISTELL, HARRIS J. ASHTON,
...COMB ALDEN, JR., JOSEPH P. BINNS,
... P. DOWNEY, WESTON E. HAMILTON,
... P. HOWE, JR., J. ELROY McCAW,
... McDONALD, LESLIE W. SCOTT,
... COMPANY, INC., ALLEN & COMPANY,
...R, BELL & CO., INC., SEYMOUR M 3-12-75
... EUGENE V. KLEIN, ALLEN MANUS 3-12-75
...MANUS, and GREAT AMERICAN INSURANCE
...NY,

Defendants.

...mn, Wise and Shepard(deft.Allen & CO)
... Broad St.NYC 10004 HA-2-7740

...s Levy Handek & Block (atty for Deft.E.Klein
...ison Av.,N.Y.10017 LE2-4800

ATTORNEYS

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NYC, NY 10017 Hamilton, Allen & Howe
687-4200

Fried, Frank, Harris, Shriver & Jacobson
(for Great American Ins.Co.)
120 Broadway NY WO 4-6500

Lovejoy, Wasson, Lundgren & Ashton
250 Park Ave, NYC 10017 for
J. Binns and L. Scott.

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
...iled X	Clerk		4/4/73	[illegible]	15 —	
...ailed ✓	Marshal		2/3/75	[illegible]		15 —
...Action: $27 of the Act of 1934	Docket fee					
...TION RULE 23 ...ION.	Witness fees					
...ose at:	Depositions					

I

ALLAN L. SPELLMAN - v - GENERAL HOST CORPORATION et al JA 1-B JUDGE

79 Civ. 23

DATE	PROCEEDINGS
Feb.6-73	Filed complaint & issued summons.
Mar.1-73	Filed Stip & Order that the time od deft Great American Insurance Co to answer is extended to 3-30-73. So Ordered 2-28-73 WEINFELD, J.
Mar.1-73	Filed Stip & Order that the time of defts General Host Corp, Weston E. Hamilton C Whitcomb Alden Jr., William P. Howe & Harris J. Ashton to answer is extended to 3-30-73. So ...ered 2-28-73 WEINFELD, J.
Mar20-73	Filed stip ...der that the time for Allen & Company Incorp. to plead, etc, is extended to ...ch 30, 1973. Weinfeld, J.
Mar20-73	Filed stip & order that the time for said Allen & Co. to plead, etc, is hereby extended to March 30th, 1973. Weinfeld, J.
Mar26-73	Filed Entry of Appearance of Atty for defts Allen S. Manus and Cecil M...
Mar29-73	Filed Stip and Order that the time for defts Allen S. Manus and Cecil Manus to answer is extended to 4-20-73. WEINFELD,J.
Apr.3,73	Filed Deft Great American Insurance Co's time to answer complaint is extended to 4/30/73. So Ordered.Weinfeld,J.
Apr.3,73	Filed Deft Allen & Co.Incorp.'s time to answer re:Complaint ... extended to 4/9/73. So Ordered.Weinfeld, J.
Apr.3,73	Filed Defts Generaal Host Corp. et al is extended to 4/13/73 re:Complaint.So Ordered. Weinfeld, J.
Apr.10,73	Filed Pltff's Stip& Order extending time to move pursuant to Rule 23,FRCP 11A (c) is extended to 5/15/73. Weinfeld,J.
Apr.3,73	Filed Deft.Allen & Co.'s Stip & Order extending time to answer will be 4/9/73 re complaint.Weinfeld,J.
Apr.12,73	Filed Deft.Allen & Co's ANSWER to Complaint
Apr.12,73	Filed Deft.Allen & Co.Inc. ANSWER to Complaint.
Apr.16,73	Filed Defts General Host Corp,Hamilton,Alden,Howe&Ashton's Stip & Order extending time to answer complaint from 4/13/73 to 4/27/73.
Apr.23,73	Filed Notice of Motion for Class Determination by Pltff & Affdvt of Lawrence Milburg.
Apr.23,73	Filed Pltff's Memorandum in support of Motion to determine that this action be maintained as a Class Action.
Apr.18,73	Filed Pltffs Interrogs to defts Set.No. 1.
May 1,73	Filed Stip & Order extending Defts General Hosp Corp,Weston E.Hamilton,C.Whitcomb Alden,Jr.,William P.Howe,Jr and Harris J.Ashton to answer to complaint is from 4/27/73 to 5/8/73.Weinfeld,J.
May2-73	Filed Stip and Order that the time for defts Allen S. Manus and Cecil Manus to answer with respect to the complaint is extended to 5-... WEINFELD,J.
May 9,73	Filed Deft.Richard D.Pistell's Notice of Motion before Judge Weinfeld on 5/22/73 2:15 P.M. dismissing complaint,etc.
May 9,73	Filed Memorandum of Law in support of Deft.Richard G. Pistell's Motion to dismiss complaint or,alternatively to require that complaint be replead.
May 9,73	Filed Answer of General Host Corp.Ashton,Hamilton,Alden&Howe to Complaint
May 11,73	Filed ANSWER of Deft.Allen Manus to Complaint.
May 14,73	Filed Deft.Great American Insurance Corp's Stip & Order re: Motion by Deft Richard C. Pistell to dismiss complaint is adjourned from 5/22/73 to 6/19/73. Weinfeld,J.
May 14,73	Filed Defts ANSWER of General Host Corp,Ashton,Hamilton,Alden&Howe by Affdvt of Service by Lorraine Brisbin by Mail on 5/11/73
May 15,73	Filed Stip & Order extending time for deft Joseph P.Binns to 6/8/73.Weinfeld,J.
May 31-73	Filed Notice of Motion Ret. 6/19/73 at 2:15 P.M. in ROOM 1106 re: dismiss comp by deft, Great American Ins. Co.
May 31-73	Filed Memorandum in support of motion pur. to Rule 12.
May 29-73	Filed summons with marshal's ret.. Served: Kleiner,Bell and Co,Inc. by Mr. Levitt, Pres. on 5/11/73. Joseph P. Binns on 4/24/73.

continued next ...

71 573 ALLAN L. SHEILHAN VS. GENERAL HOST CORP., et al

CIVIL DOCKET

	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN ENCLOSURE RETURNS
on	summonses continued SERVED:	
	Leslie W. Scott on 1/30/73.	
	Eugene V. Klein UNABLE TO SERVE	
	Seymour M. Lazar UNABLE TO SERVE	
	Richard C. Pistell on 1/18/73.	
73	Filed summons with marshal's ret. SERVED:	
	General Host Corp. by Rosemary Boyland on 2/13/73.	
	Richard C. Pistell UNABLE TO SERVE	
	Harris J. Ashton by Louis Guzzetti, Corp. Counsel of Gen. Host on 2/13/73.	
	G.Whitcomb Alden, Jr. on 2/12/73.	
	Joseph P. Binns UNABLE TO SERVE	
	William F. Downey on 2/13/73.	
	Weston E. Hamilton on 2/9/73.	
	William P.Howe, Jr. by Jeannie B. Driver, Sec. on 2/13/73.	
	J.Elroy McCaw UNABLE TO SERVE	
	Allen & Co.Inc. by Mr. R. Werbel, partner on 2/1/73.	
	Allen Manus UNABLE TO SERVE	
	Cecil Manus on 1/20/73.	
	Great American Insurance Co. by Mrs.Kaja on 2/7/73.	
	Filed memorandum of law in opposition to motions of defts Richard C. Pistell and Great American Insurance Co. to dismiss the complaint or require repleading.	
73	Filed MEMO-END. on motion dtd 5-9-73. Motion granted with leave to pleff to file an amended complaint within 10 days. All pre-trial proceedings stayed pending service of amended complaint. WEINFELD, J. (mn)	
25-73	Filed Memo Endorsed on motion filed 5-9-73--Motion granted with leave to pltff, to file an amended complaint within 10 days. All pre-trial proceedings stayed pending service of amended complaint. So Ordered. Weinfeld,J. M/N	
n25-73	Filed MEMO-END. on motion dtd 5-31-73. Motion granted with leave to pltff to fiel an amended complaint within IO days. All pre-trial proceedings stayed pending service or amended complaint. WEINFELD,J. (mn)	
Jun15-73	FiledANSWER of defts J.Binns and L. Scott to the complaint. LWL&A	
Jun25-73	Filed reply memorandum oflaw in support of deft R. Pistell's motion to dismiss the complaint or alternatively, to require that the complaint be repleaded.	
Jul 2-73	Filed AMENDED COMPLAINTand issued summons.	
Jul 10,73	Filed Pltffs Orderappointing parson to serve process by Howard Sholl of S&C on Defts Sey mour M.Lazar and Eugene V.Klein. Clk of the Court 7/10/73	
7-13-73	Filed affdvt. of service of amended complaint by pltff. on deft/C. Pistell.	
7-13-73	Filed notice by pltff to defendants that this notice shall be deemed an appl. to the Court to set down for argument, the pltff's motion that this action be maintained as a class action.	
7-13-73	Filed notice by pltff. to defts that this notice shall be deemed an appl. to the Court to set down for argument the pltffs. notice of motion that this action be maintained as a class action. (affdvt. of service attached)	

WEINFELD,J. JA 1-D

DATE	PROCEEDINGS
7-18-73	Filed stip. and order that the time of defts. to answer amended complaint is ext. to Aug. 1,1973;pltf's. motion for a class determination shall be ret. on Aug.28,1973 at 2:15 p.m.;defts. shall serve their papers in answer to pltfs. motion papers served and filed no later than Aug. 7,1973 and pltf. shall serve reply papers no later than Aug. 21,1973 and defts. time to respond to pltf's. interrog. Set No.1,is ext. to Sept. 15,1973.So ordered, Weinfeld,J.
7-19-73	Filed pltffs request for production of documents to defendants, set No.1
7-19-73	Filed ANSWER by defendant Pistell to amended complaint. HWS&T ✓
Aug. 1,1973	Filed stip. and order that the time of defts. to answer pltfs. amended complaint is ext. to Aug. 8,1973; pltfs. motion for class determination shall be ret. Oct. 30,1973 at 2:15 p.m.; defts. shall serve their papers and memoranda in asw. to pltfs. motion papers filed no later than Oct. 9,1973 and pltf. shall serve reply papers no later than Oct.23,1973 So ordered, Weinfeld,J.
8-13-73	Filed ANSWER of deft. Allen and Co. the amended complaint ✓
8-13-73	Filed ANSWER of deft. Great American Ins. Co. to amended complaint. ✓
Aug 21-73	Filed affdvt. of Howard Sholl that he served summons and amended complaint on deft. Eugene V. Klein on 8-2-73.
Aug 16-73	Filed by pltff notice to take deposotion as witnesses of Grehound Corp. on 9-11-73.
Aug 16-73	Filed AMENDED ANSWER of General Host Corp., Ashton, Hamilton, Alton, Binns, Scott, and Howe to amended complaint. ✓
Jul 31-73	Filed ANSWER of Cecil Manus to amended complaint. ✓
Jul 31-73	Filed ANSWER of Allen Manus to amended complaint. ✓
Aug 9-73	Filed ANSWER of General Host Corporation, Ashton, Hamilton, Alden, Binns, Scott and Howe to amended complaint. ✓
Aug 23-73	Filed stipulation and order that the time of deft. Great Am. Insurance Co. to respond or object to pltff's Document Demand, Set #1, is extended to and including Oct. 15, 1973 -- Weinfeld, J.
Sep.14-73	**Filed stip. and order that the time for defts. General Host Corp. Ashton,Hamilton,Alden,Binns,Scott and Howe to answer pltf's. interrog. Set. No. 1, be ext. from Sept. 15,1973 to Oct. 1,1973. So ordered, Weinfeld,J.**
Oct.9-73	Filed for Defts, General Host Corp. et al.Affidavit in response to pltff's motion.
Oct.11-73	Filed Stipulation extending time to Oct. 15, 1973. So ordered, Weinfeld, J.
Oct.11-73	Filed for Deft. Richard C. Pistell Affidavit to respond to Pltffs motion.
Oct.15-73	Filed ANSWER OF DEFT. Eugene V. Klein to Amended Complaint. ✓ PLF
Oct-26-73	Filed Pltff's Memorandum in Response to Defts' Affidavit

ALLEN SPEILMAN V. GENERAL HOST CORP. ET AL. 513JA 1-E

DOCKET PAGE FOUR 73 Civ. 513

FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
1-73 Filed Stipulation and order that pltff's motion for class action is adjourned to Nov. 20, 1973 - Weinfeld, J.			
1-73 Filed Order directing the manner of service on Deft. Seymour M.Lazar. amended complaint and within order be made on said Deft. by mailing copy by certified mail to all aforesaid addresses. --Clerk			
11-73 Filed memo endorsed on pltffs motion filed 8-23-73 for action to be maintained as a class action with respect to all defendants, : Motion granted. Settle order. -- Weinfeld, J. (m/n)			
11-73 Filed Pltff. Summons Amended Complaint and order			
11-74 Filed pltfs. interrog. to deft. Seymour M. Lazar, set #2.			
1-3-74 Filed ANSWER of deft. Seymour M. Lazar to amended complaint. FW&D			
~~PRE-TRIAL CONFERENCE HELD BY~~ Mag. Schreiber.			
1-74 Filed stip. and order that the time of defts. Gneral Host Corp., Ashton Hamilton Alden, Binns Scott and Howe to respond to pltfs. interrog. set, #1 and to respond with respect to pltfs. request for production of documents set #1, is ext. to Febl 1,1974. So ordered, Weinfeld,J.			
1-74 Filed stip. and order that the time of deft. Great American Ins. Co. to answer pltfs. interrolg. set #1 and document demand set. #1, is ext. to Jan. 30,1974. So ordered, Weinfeld,J.			
29-73 Pre trial conference held before Magistrate Schreiber.			
2-74 Filed stip. and order that the time of defts. General Host Corp., Ashton Hamilton, Alden, Binns, Scott and Howe to respond to pltfs. interrog. set #1 and to respond to pltfs. request for production of documents, set #1 is ext. to Feb. 22,1974. So ordered, Weinfeld,J.			
29-74 Filed stip. and order that the time for deft. Eugene V Klein to answer pltfs. interrog. is ext. to Jan. 25, 1974. Soordered, Weinfeld,J.			
4-74 Filed for Deft. Great American Ins. Co. - Response to Pltff's Request for Production of Documents to defendants. Set No. 1.			
4-74 Filed for Deft. Great American Ins. Co. - Answers and Objections to Pltff's Interrogatorie to Deft. Set No. 1.			
19-74 Filed stip. and order that the time of defts. Allen & Co., Inc. and Allen and Co., General Host Corp., Weston E. Hamilton, C. Whitcomb Alden Jr William P. Howe and Harris J. Ashton, Eugene V. Klein, Richard C. Pistell, Allen S. Manus and Cecil Manus is ext. to April 1,1974 to answer pltfs. 1st set of interog. So ordered, Weinfeld,J.			
22-74 Pre trial conference held by Mag. Schreiber.			
7-74 Filed notice(statement of fact of death) that deft. Wm. P. Howe, Jr. ded on March 4, 1974.			

(over)

G. 116

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
Apr.2-74	Filed stip. and order that action shall be maintained as a class action on behalf of the following former securities holders of Armour & Co.,as indicated;A class notice in form annexed shall be mailed to members of the class within 6 months after date thereof;pltf.shall bear cost of the compilation of the list of class members,etc. as indicated. So ordered, Weinfeld,J.			
Apr- 2-74	Filed deft. Klein's answers and objections to pltf's first set of interrog.			
3/26/74	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber			
4/4/74	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber			
May 1-74	Filed deft. Cecil Manus answers to pltfs. interrog.			
May 6-74	Pre-trial conference held by Mag.Schreiber.			
May 15-74	Filed order--Ordered that the stip. dated March 26,1974 providing th this action proceed as a class action be amended to the extent that th 1,1974 contained in the last paragraph of page 3 of the notice of pend action annexed to the aforesaid stip. shall now read Aug. 1,1974. Ordo Weinfeld,J. m/n			
May 15-74	Filed deft. Allen Manus answers andobjections to pltfs. interrog.			
6/4/74	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber			
Jun-24-74	Filed response of General Host Corp. et. al. to interrog. of Alan L Spielman.			
Jul-15-74	Filed defendant istell's answers to interrog.			
Jul 23-74	Filed ANSWERS and Objections of defts. Allen Co. to Pltff's First Set of Interro			
7-17-74	PRE-TRIAL CONFERENCE HELD BY Mag Schreiber			
8/13/74	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber			
Sep.3-74	Filed deft. Pistel's 1st set of interrog. to pltf.			
Sept 11-74	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber			
Oct.15-74	Filed deft. Cecil Manus 1st set of written interrog. to pltf.			
Oct.15-74	Filed deft. Allen Manus 1st set of written interrog. to pltf.			
Oct.25-74	Filed stip. and order that the time of pltf. to answer deft. Richard 1st set of ingerrog. is ext. toNov. 20,1974. So ordered, Weinfeld,			
Oct.29-74	Filed pltfs. affdt. of service of interrog. to defts. Set #1 on deft. by Patricia Cole.			
Nov 12-74	PRE-TRIAL CONFERENCE HELD BY Mag Schreiber			

PROCEEDINGS

	Filed pltfs. notice to take deposition of of the following on: General Host on Nov. 27,1974.
	Filed stip. and order that the time of pltf. to answer defts. Allen and Cecil manus' interrog. is ext. to Dec. 23,1974. So ordered,Weinfeld,J.
19-74	Filed order--ORDERED that with respect to all interrog. wherein each responding defts. has objected on the ground tht pltf. has sought identification of documents,the defts. need not identify documents indexed into general categories,etc;Defts. are to serve their supplemental responses to the interrog. by Dec. 4,1974, etc. as indicated.Mag. Schreiber. m/n (to Mag. Schreiber)
74	Filed stip. and orderthat the time of pltf. to answer deft. Richard Pistell's interrog. is ext. to Dec. 23,1974.So ordered,Weinfeld,J.
74	Filed pltfs.notice to take deposition of deft. Allen and Co. on Dec. 18,1974 and of Allen and Co.,Inc. on Dec.18,1974
74	Filed stip. and order that the time of deft. Seymour M. Lazar to answer pltfs. interrog. to defts.,set #1 is ext. to Dec.16,1974. So ordered,Weinfeld,J.
74	Filed stip. and order ext. time for pltf. to answer first set of interrog. of defendants Allen and Cecil Manus to 1-22-75. - Weinfeld, J.
3-74	Filed suppl. response of deft. General Host Corp., et. al. to interrog. of Alan L. Spielman.
74	Filed response of General Host Corp. to interrog. of Alan L. Spielman.
74	Filed plaintiff's notice to take deposition of [illegible] Co. as a witness and [illegible]
30-74	Filed pltf's notice to take depositions of Geoffrey Gates, a witness on 1-23-75 - subp. issued.
30-74	Filed stip. and order ext. pltf's time to answer deft's first set of interrog. to 1-22-75 - Weinfeld, J.
09-75	Filed stip. and order setting schedule with regard to the subp. dated 12-20-74, served upon Price Waterhouse & Co. - Weinfeld, J.
7-75	Filed supplemental response of Richard C. Pistell to interrog. of Alan L. Spielman
24-75	Filed stip. and order that pltf's time to answer deft. Pistell's first set of interrog. is ext. to 2-13-75 -- Weinfeld, J.
4-75	Filed stip. and order that the time of pltf. to answer interrog. of defts Allen and Cecil Manus is ext. to 2-12-75 -- Weinfeld, J.
5-75	Filed stip. and order that the parties will not conduct a deposition of the witness Geoffrey Gates, prior to trial, etc. - Weinfeld, J.
13-75	Filed pltfs. affdvt. and notice of motion for an entry of a protective order. ret. on 2-28-75.
02-13-75	Filed pltf's. memo in support of motion for a protective order. M&W
02-18-75	Filed plaintiff's. ANSWERS to first set of interrog.
02-18-75	Filed affdvt. and noticeof motion to consolidate --ret 2-25-75 (filed 73 Civ 275)
02-18-75	Filed pltfs. Spielman's memorandum of law in support of motion above.(filed in 73 275)
01-31-75	Filed defts Gen. Host Corps. notice of taking deposition of parties and dates indicated herewithin.
02-03-75	Filed deft. Gen Host Corp. notice of taking deposition of pltf. Alan L. Spielman on 02-05-75.
02-20-75	Filed pltf's ANSWERS to interrog. of deft Allen Manus M&W
02-20-75	Filed pltfs. ANSWERS to interrog. propounded by deft. Cecil Manus.
02-24-75	Filed memo. of Pltf. Securities and Exchange Commission in response to motion of Pltf. Spielman for consolidation procedure. +++(filed 73 Civ. 275)

DATE	PROCEEDINGS
02-24-75	Filed affdvt. of deft. Richard C. Pistell opposing application by Spielman for consolidation
02-24-75	Filed memo. of deft Richard C. Pistell in opposition to Pltfs. Spielman's motion to consolidate.
02-25-75	Filed pltf's supplemental memorandum in support of motion to quash and in opposit to motion to reconsider class status
02-25-75	Filed affdvt of Melvyn I. Weiss for pltf in opposition to motion of certain defts for an order demanding that this action should not proceed as a class action.
02-27-75	Filed stip. and order of discontinuance as to deft. Great America Ins. Co.--Weinfe m/n
02-27-75	Filed pltf. notice of takeing deposition as a witness. of Price Waterhouse & Co. by John Zick on 3-3-75.
03-03-75	Filed memorandum of law of defendants General Host Corp., Ashton Hamilton, Alden, and Scott in opposition to pltf. Spielman's motion to consolidate 73 Civ 573 and 73 Civ 275
03-03-75	Filed deft's affdvt. of Geoffrey Bass of service
03-03-75	Filed deft's affdvt. of Edwin E. McAmis in opposition to p tfs motion to consolia 73 Civ 275 and 573 for trial.
03-03-75	Filed memo endorsed on pltf. Spielman's motion to consolidate 73-275 and 73-573 Motion denied - So ordered. Weinfeld, J. (filed in 73 Civ 275) m/n
03-03-75	Filed memo endorsed on pltf's motion filed 2-13-75: Plaintiff's motion for a pro is granted. -- Weinfeld, J. m/n
03-21-75	Filed pltf. affdvt. submitted for the purpose of clarifying my position with re to work performed as class representative in the instant action.

Antitrust Continuation

Date Order or Judgment Noted

PROCEEDINGS

Filed defts. General Host Corp.et al affdvt. and notice of motion for an order determining that this action should not proceed as class action ret. 2-25-75

Filed deft's Gen Host Corp memo. on behalf of application for an order that the litigation not proceed as a class action and in responce pltf.'s motion to vacate notice of oral deposition of class members.

Filed affdvt. of deft. Richard C. Pistell in support of the application on behalf of Gen Host Corp. et al to deny class action status to pltf case and in opposition to pltf. motion to vacate.

Filed deft's Gen Host Corp. et al Memo. Endorsed on motion filed 2-25-75 determining that this action should not proceed as class action. Motion denied Weinfeld, J. m/n

Filed letter of Edwin E. McAmis requesting adj. of trial with Memo endorsed application denied. The case will proceed to trial on April 14, 1975--Weinfeld, J. m/n

Filed unsigned stip. of discontinuance and severance with Memo. end.--The withing application is placed on the motion calander for April 8, 1975. at 2:14p.m. notice therof shall be given by pltfs atty. to all atty's appearing for the parties in the action---Weinfeld, J. m/n

Filed stipulation signed today. Ordered, that action is severed and discontinued as to deft. Eugene V. Klein. The complaint is discontinued against deft. Klein with prejudice and ordered, that during the pendency of this action, and until such time as the amended complaint against Klein is dismissed in accordance with paragraph 1, Spielman's claims against Klein shall, and the same are severed for all pre-trial and trial purpose from claims set forth by Spielman against all other defts. and Klein shall not be bound by or participate in any further pre-trial proceedings in this action --Weinfeld, J.

Filed stip. and order that the amended complaint shall be discontinued against Lazar without prejudcie and without costs and ordered during the pendency of this action, and until such time as the Amended Complaint against Lazar is dismissed in accordance with paragraph 1, Spielman's claims against Lazar shall, and the same are severed for all pre-trial and trial purpose from claims set forth by Spielman against all other defts. and Lazar shall not be bound by or participate in any further pre-trial or trial proceedings in this action--Weinfeld, J.

Filed stip. and order that the complaint shall be discontinued against the Manuses with prejudice and without costs. Ordered during the pendency of this action, and untill such time as the Amended Complaint against the Manuses is dismissed in accordance with paragraph 1, Spielman's claims against the Manuses shall, and the same are, servered for all pre-trial and trial purpose from claims set forth by Spielman against all other defts. and the Manuses shall not be bound by or participate in any further pre-trial or trial proceedings in this action --Weinfeld, J.

Filed deposition of General Host Corp. by T. T. Day

Filed deposition of deft. General Host Corp. by J. P. Glynn

Filed deposition of Price Waterhouse & Co. by Arthur Bettauer

Filed deposition of Price Waterhouse & Co. by John W. Zick

Non-Jury trial begun before: Weinfeld, J.

Trial continued

Trial continued

Trial continued and concluded decision reserved.

Filed pltf. pretrial memorandum

Filed pltfs. request for production of documents

(continued on page -10-)

DATE	PROCEEDINGS	Date Judge
08-14-75	Filed Amended complaint	
08-14-75	Filed pltf's Legal contentions	
08-14-75	Filed pretrial memorandum of the pltf.	
08-14-75	Filed pltf's response to defts pretrial memorandum	
08-14-75	Filed pltf's proposed findings of fact and conclusions of law	
08-14-75	Filed pltf. propsoed findings of fact and conclusions of law	
08-14-75	Filed pltf's Response to defts proposed findings of fact	
08-14-75	Filed ppltf.'s post-trial memorandum of law	
08-14-75	Filed pltf's post trial Answering brief	
08-14-75	Filed consent pre-trial order --Mag. Schreiber	
08-14-75	Filed defts. proposed findings of fact and conclusions of law	
08-14-75	Filed defts. objections to pltf's post-trial proposed findings of fact and conclusions of law	
08-14-75	Filed defts. Allen & Co. Inc. and Allen & Co. supplementary pretrial memorandum of of law	
08-14-75	Filed defts pre-trail memorandum	
08-14-75	Filed defts. proposed findings of fact and conclusions of law	
08-14-75	Filed defts. post-trial brief	
08-14-75	Filed defts. post-trial Reply brief	
08-14-76	Filed OPINION # 42965 The foregoing, together with the facts stipulated by the parties, shall constitue the Court's findings of fact and conclusions of law judgment may be entered for the defts. --Weinfeld, J. m/n	
08-27-75	Filed Final Judgment and Order action having come on for trial as a class action	
08-27-75	in which pltf sued as representative of a class of pltfs. Ordered that all future proceedings in this action on appeal or otherwise, the caption shall be amended to omit the names of all persons named as defts in the amended complaint except those defts named herein against whom this action was tried, and that the pltf. and member of the class as herein , the acti be dismissed on the merits as to all defts and that the defts recover of pltf their costs of action--Weinfeld, J. m/n Judgment entered 8-27-75 -clerk	

ADDITIONAL SHEET OF ATTY'S LISTINGS

JA 1-K

PROCEEDINGS	Date Order or Judgment Noted
Deft: Seymour M. Lazar	
Paul C. Warnke	
Clifford, Warnke, Glass, McIlwain and Finney	
815 Connecticut Ave. NW	
Washington, DC 20006 202-298-8686	
(Local Counsel)	
[illegible] Rowe, Jr.	
[illegible] Walter and Duncombe	
[illegible] Rockefeller Plaza, NYC 10020 JU 6-0700	

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

ALAN L. SPIELMAN,

Plaintiff,

vs. : 73 Civ. 573 EW

GENERAL HOST CORPORATION, RICHARD C. PISTELL, HARRIS J. ASHTON, C. WHITCOMB ALDEN, JR., JOSEPH P. BIUNS, WILLIAM F. DOWNEY, WESTON E. HAMILTON, WILLIAM P. HOWE, JR., J. ELROY McCAW, EDWIN C. McDONALD, LESLIE W. SCOTT, ALLEN & COMPANY, INC., ALLEN & COMPANY, KLEINER, BELL & CO., INC., SEYMOUR M. LAZAR, EUGENE V. KLEIN, ALLEN MANUS, CECIL MANUS and GREAT AMERICAN INSURANCE COMPANY,

Defendants.

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Before:

HON. EDWARD WEINFELD,

District Judge.

New York, April 14, 1975,
10:00 a.m.

APPEARANCES:

MILB[illegible] & WEISS, ESQS.,
Attorneys for Plaintiff
MELVYN I. WEISS, ESQ., and
BERNARD A. FEUERSTEIN, ESQ., of Counsel

LOVEJOY, WASSON, LUNDGREN & ASHTON, ESQS.,
Attorneys for Defendants General Host Corp, Harris J. Ashton, Weston E. Hamilton, C. Whitcomb Alden, Joseph P. Binns and Leslie W. Scott;
EDWIN E. MC ANIS, ESQ. and
DANIEL J. SULLIVAN, ESQ., of Counsel

HAVENS, WANDLESS, STITT & TIGHE, ESQS.,
Attorneys for Defendant Richard C. Pistell;
GARY P. ROSENTHAL, ESQ., and
GERALD J. FIELDS, ESQ., of Counsel

HOLTZMANN, WISE, SHEPARD, ESQS.,
Attorney for Defendant Allen & Company;
GEORGE M. DUFF, JR., ESQ.,
NORMAN SOLOVAY, ESQ., and
ROBERT H. WERBEL, ESQ., of Counsel

SHEA, GOULD, CLIMENKO, KRAMER & CASEY, ESQS.,
Attorneys for Defendant Allen & Company, Inc.;
MILTON S. GOULD, ESQ., and
HARVEY J. GOLDSCHMID, ESQ., of Counsel

- -

(Case called.)

THE CLERK: Is the plaintiff ready?

MR. WEISS: Read, your Honor, with one caveat: I have a truck on its way for the last hour with the records. It left when I did, it should be here any second. I don't it will hold us up.

THE COURT: Before you proceed, in going over the pretrial order and the briefs that were submitted

over this weekend, I findthat both the pretrial order and the briefs have reference to an issue regarding the relationship between Allen & Company and Allen Inc. I don't know if counsel for Allen & Company -- and I am directing my remarks to him because there was a waiver of the jury trial in this case --

MR. DUFF: Yes, your Honor.

THE COURT: -- in another issue, an issue of credibility. In that connection, I ruled adversely on this issue as far as Allen Company was concerned. Have you been aware of that?

MR. DUFF: Yes, sir, we are aware of that and we are perfectly contended to go forward before your Honor.

MR. GOULD: I might say for the record that representing Allen, Inc.,I join in that.

THE COURT: Well, I just wanted to mak sure that there was no misapprehension on anybody's pa[illegible].

MR. DUFF: Your Honor, I am George Duff, representing Allen & Company on behalf of Holtzmann, Wise and Shepard. We are perfectly familiar with the record in that case.

MR. WISE: Your Honor, on that point we

have received many memos and other documents in the last couple of weeks and in some of them, both the Holtzmann, Wise firm and the Shea, Gould firm are represented as representing Allen, Inc. and Allen Company and in others they represent one. I am confused, myself.

THE COURT: What difference does that make to you?

MR. WEISS: I just want to know who is representing whom?

THE COURT: I assume it will be stated for the record, as has been stated, who represents whom.

MR. GOULD: Let's state it, but so it is clear, I am from Shea, Gould, representing Allen, Inc., the corporation. Mr. Duff's firm is representing Allen & Company.

Mr. Goldschmid is associated with us in representing the corporation.

THE COURT: Then I have it right that Allen & Company, Inc. is represented on this trial by Milton S. Gould and Harvey J. Goldschmid, is that right?

MR. GOULD: The corporation, yes, sir.

THE COURT: I said that.

And Allen & Company, the partnership, is

represented by Holtzmann, Wise & Shepard. And who is trial counsel.

MR. DUFF: Trial counsel are George H. Duff, Jr. and Robert H. Werbel.

THE COURT: Let me get that. Suppose you start again.

MR. DUFF: George H. Duff, Jr., Robert H. Werbel and Norman Solovay.

THE COURT: The plaintiff is represented by Milberg & Weiss, and trial counsel are Melvyn I. Weiss and Bernard A. Feuerstein and Paul J. Tullman.

General Host Corporation and others --

MR. MC AMIS: Lovejoy, Wasson, Lundgren & Ashton, your Honor. I am Mr. McAmis. Trial counsel are Edwin E. McAmis and Daniel J. Sullivan.

THE COURT: And the defendant Pistell is represented by Havens, Wandless, Stitt & Tighe?

MR. ROSENTHAL: That's right, your Honor.

Depositions of this matter have been conducted in England and my partner Mr. Brown will be in to conduct the trial in the next day or so. For today and tomorrow it will be myself and Mr. Gerald J. Fields for the defendant Pistell. Probably beginning tomorrow

or the next day it will be Paul M. Brown and myself for the defendant Pistell.

THE COURT: Proceed.

MR. WEISS: Your Honor, we served a notice to produce upon the defendants General Host and Ashton and Pistell. We request the production of transcripts given by those gentlemen before the Securities and Exchange Commission in connection with an investigation conducted by the SEC. I would like those documents produced at this time.

MR. MC AMIS: Your Honor, I object to the production of defendant Ashton's testimony at this time for these reasons: This hasn't been produced in the past. It wasn't requested until Wednesday when Mr. Weiss appeared before the magistrate with a request. The magistrate turned him down on the ground that it was too late. We have received this notice to produce this morning. The document is in court, but I believe that it should not be produced at this time.

Mr. Weiss has known about this private investigation ever since this case began and never requested the document. The SEC made a practice not to turn over transcripts in its private investigation unless it was taking the deposition of a witness in its case,

which was formerly before this court, and Mr. Weiss never asked for Mr. Ashton's deposition. In fact, he waived the taking of Mr. Ashton's deposition provided Mr. Ashton would be available as a witness at the trial and I undertook that Mr. Ashton would be so available.

This is a transcript that goes back several years. It was taken in a private investigation and I do not believe,if given the opportunity that Mr. Weiss has had to request it before, that we should be compelled to turn it over now.

THE COURT: What investigation was that taken in? You say a private investigation?

MR. MC AMIS: This was a private investigation, your Honor, by the Securities and Exchange Commission entitled "In the Matter of Armour & Company," and I think its number was "Home Office 416." It proceeded from 1969 until about 1972, I think, the last transcript was taken, and it dealt with the "General Host exchange offer for Armour securities.

THE COURT: What's the distinction between a private investigation and a public investigation? Why do you refer to it as a private investigation. Is there a distinction?

MR. GOULD: There is, your Honor. A private investigation is one which is so denominated when the Commission says it is to be private and it is conducted privately so that nobody gets injured by the process of investigation. There is a point at which these private investigations become public investigations and they are so dominated as public.

Now, the private investigation is an investigative process, as it says. It's not normally public testimony. If we wanted to get it, for example, we would have to make an application to the full commission on a showing of the need ror the document.

THE COURT: Mr. Weiss, is it correct you applied for this relief before the magistrate?

MR. WEISS: Yes, it is, your Honor -- not this relief, no. What I requested was that the magistrate direct the SEC to turn over its copies.

THE COURT: Where is there jurisdiction to direct the SEC to turn over its copies to a nonparty?

MR. WEISS: The SEC informed me that if a judge such as Magistrate Schreiber directed them to turn it over to me they would.

THE COURT: Did he direct that they turn it over?

MR. WEISS: No, but they said I could serve notice to produce. In other words, I could seek it from the defendants in this case.

THE COURT: Of course, this is typical of events going on in this case, waiting until the last minute to take action. The pretrial order was signed only April 9th last week. The motion to turn over is denied. If the occasion arises that there is need to use it for cross examination purposes, I will consider it then.

MR. WEISS: Your Honor, that's the only purpose I intend to use it.

THE COURT: Proceed with the trial.

MR. WEISS: Might I just say with respect to the date on the pretrial order that we complied with every direction of Magistrate Schreiber, and we were very timely in our filing of those papers.

THE COURT: All right, gentlemen. Proceed with the trial.

MR. ROSENTHAL: Excuse me, your Honor, would you rule that your direction with regard to the transcripts applies also to the defendant Pistell?

MR. WEISS: Your Honor, there is an application returnable by Price, Waterhouse. We were served

with it late Friday and it is returnable at 10 o'clock this morning.

MR. HANSEN: Your Honor, I am James Hansen from Cravath, Wwaine & Moore.

THE COURT: Is this a direction to appear today or some other day? What's the problem?

MR. HANSEN: The witness who has already been deposed by Mr. Weiss: Mr. Brettauer. The plaintiff doesn't want to call him today, but it would be out of sequence.

THE COURT: Shouldn't the plaintiff have a right to call a witness when he thinks he needs the witness?

MR. HANSEN: Mr. Brettauer has to be out of town on business on Tuesday or Wednesday. It is something that can't be postponed.

THE COURT: When didyou want to call him as a witness?

MR. WEISS: Your Honor, I had agreed with Mr. Hansen that I would take him on Thursday even if my case was completed by tomorrow. In other words, I would take him out of sequence after defendants had put in their case and the defendants had so stipulated also. At the last minute, apparently, on

Friday, as I understand it, the defendants decided to withdraw their stipulation to that procedure, compelling Mr. Hansen to make the petition he has now made.

MR HANSEN: Your Honor, it wasn't a stipulation but I did have an agreement from Shea, Gould and Lovejoy, Wasson that they would permit the plaintiff to close his case subject to Mr. Brettauer's testimony and I thought that that resolved it. But they don't want to consent to that, at least the attorneys for General Host don't, and Mr. Brettauer is here this morning. The documents called for by the subpoena are here and he is prepared to testify today. I just request that he be permitted to attend his important business, which is in Richmond, Virginia, tomorrow and Wednesday, and be permitted to testify either today or Thursday or some other day.

THE COURT: What's the objection to that? I don't understand. Recently I have been getting matters involving so-called leading firms that just shook me in terms of lack of civility towards one another in making accommodations. What is the problem?

MR. MC AMIS: May I explain, your Honor?

THE COURT: Why do we spend time on this?

MR. MC AMIS: My only concern, your Honor, si that the plaintiff has advised us that his case may terminate tomorrow. We have in mind that we would like to make a motion or probably will make a motion to dismiss at the end of the plaintiff's case. I am afraid that if it were closed subject to taking Mr. Brettauer later, that would would interfere with our ability to make that motion. That's my only concern. If he is only going to have a two-day case and Mr. Brettauer is here today, I don't see why we can't take Mr. Brettauer today.

THE COURT: Of course, the subject of his testimony has already been received by the court in the prior injunction proceeding, as I recall it, and all of you made reference to it in your briefs. I think you are acting like school children about this thing now.

MR. WEISS: Your Honor, I am willing to stipulate to use the transcript, the deposition I took in this proceeding, in which these defendants were present and had the opportunity to cross examine.

THE COURT: Well, proceed with the trial. The witness indicates that he will be here today. At the end of the day he may make an applica-

tion to be relieved of the terms of the subpoena for a given period of time.

MR. HANSEN: Thank you, your Honor.

MR. WEISS: Your Honor, will you hear opening statements?

THE COURT: If you wish, but put a time limit on it.

MR. WEISS: I will try to make it brief.

THE COURT: What do you call brief?

MR. WEISS: Ten or 15 minutes.

THE COURT: All right. Ten or 15 minutes, each party.

MR. WEISS: Your Honor, I would like to dispell what I believe are certain misconceptions that are being proffered by the defendants in their pretrial findings, proposed findings, and in their brief.

So that we will have a clear understanding of exactly what the plaintiff is contending in this action, the defendant spent a great deal of time bringing to this court's attention ad nauseam documents, transcripts, letters, correspondence of things that happened prior to the effective date and shortly after the effective date of this exchange offer.

Now, what we are dealing with here, your

Honor, is a prospectus. This prospectus was issued by General Host in connection with an exchange offer for Armour & Company's securities, and that prospectus became effective on January 30, 1969.

On January 27, 1969, but two or three days before the effective date of the General Host prospectus, Greyhound made a competing tender offer for the same Armour shares, offering cash to these Armour shareholders. The defendants have stated throughout their papers all of the contents being made by plaintiff in this proceeding were made prior to your Honor's ruling in the Armour & Company litigation, where your Honor was confronted with a request for injunctive relief by Armour and a shareholder of Armour.

Now, that action was instituted in the middle of January, 1969. The Illinoi securities proceeding had been instituted in January of 1969. That was a proceeding in the State of Illinois by the Securities Commission of that state, where it was asked to issue injunctive relief within that state, under the blue sky laws.

The defendants would have this court believe that all of the language that was contained in the January 30 prospectus, the one that actually became

operative for use in connection with that exchange offer was the same language that appeared in prior filings.

Now, the first filing was the S1 filed with the SEC on December 30, 1968. There was an amendment, No. 1, filed some time during January of 1969, and the amendment No. 2 on January 29, which became effective the very next day. Much of the claim by plaintiff of material misstatement and omission was never in any filing by General Host prior to January 29, 1969.

Defendant in its memo states almost the identical language was sent to stockholders via proxy statement by General Host in December of 1968. Well, the fact is, and your Honor will be able to see it clearly, this language is not in that prospectus.

So I want to emphasize that we are dealing with one document, the one that became operative, the one that the SEC had but one day to look at before it was declared effective.

THE COURT: Didn't the prospectus include the proxy statement that had gone to General Host stockholders?

MR. WEISS: I'm not sure I understand that, your Honor.

THE COURT: I say, did the prospectus include the proxy statement?

MR. WEISS: I don't believe so.

MR. GOULD: We would contend it might have included the subsequent one, but not the proxy statement.

THE COURT: I read somewhere that there was an inclusion of proxy statement material in the prospectus.

MR. GOULD: Yes, that's correct.

MR. MC AMIS: And in certain relevant respects, your Honor, it was verbatim between the two documents.

MR. WEISS: I don't think there is any contention, your Honor, that the language on page 9 of the prospectus that we are talking about in this case or the pro forma combined statements or any of that material was sent to anybod via the proxy stateme Maybe the pro formas were, but certainly not the language.

We contend, your Honor, that the defendants during the relevant period created an illusion. This illusion started way back in August when it entered into a contract with Gulf & Western Corporation to purchase certain Armour shares and it obtained an option to purchase additional shares. At that time it purchased 150,000 shares and it optioned for another 600,000 shares.

Ultimately on October 16, 1968 the closing was held where the final 600,000 shares were purchased and in order to finance these purchases General Host had to borrow approximately $60 million.

It borrowed it in two stages. I want to correct that. It borrowed 47.4 million dollars to purchase the 750,000 shares from Gulf & Western through a private placement of convertible notes which the Allens and Kleiner, Bell acted as broker or agent for General Host and got a substantial bid, something like $583,000.

Immediately after that, General Host borrowed approximately $14 million from some banks to buy another 252,000 shares in open market transactions, so when we get to December 30, 1968 when it files its first preliminary S-1 for the change-over it already owned approximately 1,002,500 shares for which it paid approximately $60 million.

General Host was a company with a total net worth of about $35 million. It went into great debt to buy this initial block. The evidence will indicate that studies were prepared internally concerning what General Host might do with Armour and in those studies there was pointed out several of the difficulties that General Host might encounter in the future, various options that it had including staggered board and cumulative voting positions in Armour.

It files this December 30th S-1. At that point there is no opposition from a third party except that Armour & Company evidences its opposition quite emphatically. Armour had 17 directors under the staggered board provisions. They came up for election 6,5,6 in the next three annual meetings. We will demonstrate that throughout this period General Host was working under the assumption that it could obtain 80 per cent ownership of Armour. If it obtained 80 per cent ownership in General Host several things could be accomplished. They might affect certain tax savings by consolidating the financial statement of the two companies which, incidentally, we will demonstrate could not be done without the consent of Armour's board of directors. They could elect faster their own designees to the board of Armour. These are the

assumptions they worked on.

Now, on January 27th, Greyhound pops in with a competing cash tender offer and in that tender offer it announces: We already have 18.5 per cent of Armour stock. It became evident at that point that the ability to obtain 80 per cent was almost nil if not impossible, yet it files a prospectus amendment number 2 on January 29th which becomes effective the next day where General Host represents to the Armour shareholders various things that make the Armour shareholder believe, leads them to believe that if they get 50 per cent or more that General Host will be able to do certain things such as increase the dividends of Armour, sell certain Armour divisions and assets to create cash flow, and this is the page 9 language that we complain about.

The fact is that within days of the filing of that prospectus the president of General Host goes to another Court in Chicago before Judge Julius J. Hoffman in an action brought by the U.S. Government, which is trying to enjoin General Host's take-over of Armour, and Mr. Ashton states in an affidavit, and Albert Jenner states in open Court:

"Your Honor, we don't think we are going to get control that quickly and until the Government can

demonstrate that control is imminent they shouldn't get their injunctive relief."

So here they are at the same time mouthing one thing to a judge in Chicago because it suits their purpose in order to ward off the Government's attempts to get an injunction against the take-over, and at the very same time filing with the SEC language which clearly indicates that they can do certain things that require operating control.

THE COURT: What are the specific things that you rely upon as a representation here?

MR. WEISS: On page 9 of the prospectus, your Honor, they state:

"General Host may find it desirable upon consummation of the exchange offer to propose to stockholders of the relevant corporations a merger or consolidation of it or its present or future subsidiaries with Armour or certain of its subsidiaries, or General Host may find it desirable to dispose of portions of the assets presently held by it or by Armour."

General Host will dispose.

"If no such merger or consolidation occurs and if General Host has not acquired 80 per cent of Armour's common stock which would allow it to enter into tax saving

arrangements, General Host may find it necessary or desirable to increase the dividend period on common stock by Armour," which is a statement General Host will increase the dividend paid by Armour.

"General Host intends to act promptly both before and after consummation of the exchange offer to obtain control of the board of directors and management of Armour. In this connection it may engage in the solicitation of proxies for the election of directors of Armour and in other matters both at the February 21, 1969 annual meeting of Armour & Company and otherwise."

A clear implication that through the solicitation of the proxies they will be able to obtain operating control of Armour.

The fact is only six directors were up for election at that meeting. We have deposition testimony from the defendants' own mouths that they thought they could get control of Armour at the February 21, 1969 meeting.

It is respectfully submitted, your Honor, that without operating control of Armour's board of directors they could not increase Armour's dividends or cause Armour to sell off any of its assets, and even then they would have to act as fiduciaries in Armour's best interests.

B2 Now, the issue posed before Judge Hoffman in Chicago by the Government was that control by Host of Armour was imminent. They read the papers that were filed by Host prior to that date.

"It was imminent," they said, "And we urge your Honor to enjoin this imminent take-over of control in re to which General Host puts in an affidavit, Your Honor, the Government is wrong."

And we will show your Honor that whole document in the course of these proceedings.

Now, defendants urge that this document, when it was examined with a fine tooth comb all these issues were raised. I read your Honor's decision. I haven't seen that issue raised there. I frankly feel that even if it was raised before the Commission, if it is wrong in the prospectus it is actionable.

But the fact is these issues were not raised.

Let's take the cash flow problem. There was a lot of testimony and a lot of hearings in which this issue was discussed, but, you know, it is peculiar that there is nothing in the prospectus. There is no cash flow projection in the prospectus. There is nothing that the defendants state in the prospectus to indicate to a reader that there are counter-contentions about its--

THE COURT: I thought that that did not have to be set forth under SEC regulations.

MR. WEISS: All I am asking for is a statement that in order to service the debt we intend to create by virtue of this issuance we have to employ future projections. We cannot do it on historical basis. Then the investor knows what the premise is for the company's belief that it can meet this debt. He can make an investment decision more intelligently. It is a must.

What do they say in the prospectus?

"An action was started against us by Armour and an action was started against us by the State of Illinois. An action was started against us by the U.S. Government."

But they don't say what the basis--

THE COURT: Is that all that was said, just that an action was started? Didn't they go beyond that? I want to make sure. Is that all that was said, that an action was started?

MR. WEISS: It says more, your Honor, but it doesn't say anything to a reader which would indicate--the nature of the allegations. Here it is on page 8, and it is under "Position of Armour's Present Management," as a subtitle.

"The Court said"--

THE COURT: I assume that sooner or later this prospectus will come in evidence. If somebody has a copy, I would appreciate one. I saw it once, but I haven't seen it since. What page are you on?

MR. WEISS: Page 8, your Honor, the bottom of the page. It states that, "The lawsuit charges the company, its directors, officers with various conspiracies and acts in violation of the securities laws and seeks to enjoin the making and consummation of this exchnage offer."

"On January 27, 1969, Armour's application for a temporary restraining order was denied by the Court. The Court set the hearing date for February 4, 1969 on a motion for preliminary injunction against the exchange offer. In the opinion of counsel for the company there appears to be no merit to the contentions presented in this action."

I don't see any other language.

THE COURT: Let me ask you at this point, as long as you read the reference to the lawsuit, which states that the various defendants are charged with various conspiracies and acts in violation of the securities laws and seeks to enjoin the making and consummation of the exchange offer, what more do you think could be said in

respect to that action, the complaint and so forth?

MR. WEISS: I will tell you what I think should be said, your Honor. The defendants give an opinion on the merits of that action in this presentation. They say they don't think there is any merit. What is it that they are saying? What was Armour saying?

Armour was saying that they are using projected earnings rather than historical earnings in their statement of their ability to finance the debentures that are being issued pursuant to this prospectus.

Defendants say, "We deny it. We deny that."

Well, the fact is, your Honor, they were using projections.

THE COURT: That isn't what I asked you. My question was this: If you were the one who was drafting this prospectus what would you have added in addition to what is set forth as to the nature of the lawsuit that has been commenced?

MR. WEISS: I would have said that defendants are contending that the use by General Host of projected earnings rather than historical earnings in determining their ability to meet their debt service and debt obligations in the future and that that is improper.

Host is using projections but thinks it is

proper.

Now, I am an investor. I can make a decision. Should I rely upon their projections as to whether or not they are going to be able to service my debt or should I not, or should I make further inquiry? Is there anything in there that evidences that the same audit firm, Price, Waterhouse, has two witnesses submitting to the tribunal's counter-contentions with respect to this issue?

Now, the defendants are going to urge this Court, "Well, we set forth these risks. Look in the back in the appendix under the Armour section. We say that Armour has cumulative voting and staggered board provisions.

It so states in the back of the prospectus in the appendix, but there is no reference back there to the risk that these provisions caused an Armour shareholder who was tendering to General Host. They don't say back there where they make reference to it in the appendix, "See other aspects of the exchange offer where we state we can do certain things and our ability to do those certain things will be substantially--maybe substantially impeded by these provisions."

THE COURT: If the defendants don't make this argument, I'm surprised they don't. Couldn't the defendants argue that Armour stockholders could be presumed to

know what the voting rights are with respect to directors, whether it is cumulative and staggered directorships? I would assume they would say a stockholder would know. They haven't made that argument anywheres, unless I missed it in the briefs.

MR. WEISS: I don't think it is an argument that really should be--

THE COURT: I'm not saying they should. Maybe they agree with you and it is not an argument that should have been made.

MR. WEISS: The fact is that it is up to General Host, when it is issuing a prospectus to be read by these people, to assert things that are truthful, that give all of the material risks and that don't omit material facts and don't misrepresent material facts.

B3 I think it is a material omission not to state that we on the basis of historical earnings cannot finance our future debt obligations. We will also prove a step further, your Honor: That even the internal projections were used by the defendants at the time omitted will have substantial debt obligations that would come up within the immediate future in their calculations, so that even on a projected basis they could not meet their debt service and debt obligations as they came due without substantial out-

side finance.

There are many other things in issue here, your Honor. I think they will develop as we go along.

I want to say a few words on another question. The defendants in their pre-trial memorandum make a statement about the use of expert counsel during that time frame.

Your Honor, I have to object to any introduction of that kind of language. We went into questioning at the depositions of the various defendants as to conversations they had with their counsel. On every occasion we were heatedly opposed. Objections were made and we went for rulings down below before Judge Schreiber. He ruled that all I could ask was, "Did you have a conversation?" I couldn't go into the substance of it.

Having placed as a barrier to my searching those communications between attorney and client, the attorney-client privilege, it does not sit very well in my opinion for defendants to be raising as a defense at the trial the reliance by these people upon their attorneys.

MR. McAMIS: Your Honor, I would like to address a few opening remarks to the Court on behalf of General Host Corporation and the individual directors and former directors of General Host whom I have the honor to

represent at this trial today. This is the second occasion on which Host's January 30, 1969 prospectus has come before this Court for judicial scrutiny.

The first occasion was when Armour sued to enjoin the use of that prospectus in the exchange offer that commenced when the registration statement was declared effective January 30, 1969. Armour sued them on behalf of its shareholders, who it said would be misled by the contents of the prospectus. That matter came up in a preliminary injunction hearing before your Honor on February 5th and at that hearing it was demonstrated to the Court that the prospectus had been prepared and issued at a time when there was the competing tender offer for cash by Greyhound.

The Host tender offer was to take Armour's stock in exchange for Host's securities and the Armour management had vociferously opposed the Host offer in every forum open to it, including the SEC, the State Blue Sky commissioners, the public, press, letters to Armour shareholders and ultimately in this Court.

After reviewing the prospectus, your Honor determined that there was no showing of a violation of the securities laws in the prospectus sufficient to justify the issuance of a preliminary injunction.

Your Honor also pointed out that the Commission had had all these points which were raised by Armour in this Court before it and that it nevertheless had declared the registration statement effective.

After that, the competing tender offers went forward and when they were both over General Host had acquired 54 or 55 per cent of Armour's common stock and Greyhound had acquired 32 per cent.

This plaintiff comes to this Court today seeking to represent those Armour shareholders who tendered. He also claims to represent Armour's was in fact more extensive at that time. It claimed to represent all its shareholders. The plaintiff today narrows out of that the shareholders of Armour who tendered to Host.

The plaintiff again attacks this prospectus and he attacks it on the same basis that Armour made its attack in 1969, both in Court and elsewhere.

THE COURT: I understand it goes beyond that. He claims the amendments that were made were not before the Court at the time. He contends these contentions are broader than those that were advanced in the matter that was before me at the time.

MR. McAMIS: I so understood counsel to say in his opening, your Honor, and I frankly was very surprised

to hear that because there can't be any dispute that the prospectus that was before you on February 5, 1969 was the January 30th prospectus in its entirety and that the language that plaintiff has read to you today was in that prospectus at that time.

As a matter of fact, in our papers I still have the actual prospectus that was used in evidence and it still has the clerk's stamp on it at the time it went into evidence.

The plaintiff is complaining about language, the language on page 9, which was inserted not after the prospectus, quite the contrary. It was inserted before that prospectus went effective and was designed to deal with--and we will have the testimony showing it was designed to respond to some of the complaints that Armour was making, and it is quite true that that language of that third paragraph under the item "Other Aspects of the Exchange Offer" was not in the Host proxy statement or in the initial drafts of the prospectus that went to the Commission, but it was included in the draft which is dated--the second amendment, which is dated January 29, 1969 and there can be no dispute that it was part of the language that was approved by the Commission of January 30th, and it was in the language of the final prospectus as presented to

this Court on February 5th, and it was designed as a curative when Armour made certain complaints about General Host's lack of ability to take immediate control or its cash flow problems.

As I say, these complaints, cash flow and control, were the basic complaints that Armour was stating in 1969. As I understand the plaintiff's burden today in this action under the 1934 Act, he must demonstrate that there was an omission or misrepresentation in the prospectus; that it was material and that it was omitted recklessly under the cases in this Circuit.

B4 In fact, it is a heavier burden, it seems to me than Armour had under the 1933 Act and under Sections 11 and 12. As I understand it, Armour needed to show only an omission, but there was no showing of omission and I submit that on the proof the plaintiff has today he cannot show an omission and he certainly can't show, as he is required to do under the 1934 Act, that the omission was reckless.

The interesting thing about this case, I believe the unusual thing, your Honor, is that it really comes down to a trial on the merits of the 1969 case after the denial of the preliminary injunction application. This trial is no more and no less than that.

Why do I say that? It is because the plaintiff has never uncovered any fact that existed in 1969 that wasn't dealt with in that registration statement and that wasn't known to the SEC, to us, to our adversaries and to this Court.

There has never been any proof that there was any insider trading. There were no bribes to anybody in the Banana Republic. There simply is no fact that has ever come to light since 1969 that was not known and dealt with in 1969 and that to me makes it a simply rehash of what Armour was talking about at that time, and when you have that kind of a situation where everybody on both sides knew what the facts were, it really comes down to a question of judgment as to what is said, what goes into a prospectus and what doesn't, and in the case of what goes in, how much you have to say about it, and I submit that that is all there is here. It is a question not of any secret that has come out of the closet since then.

It was in 1969 purely a question of judgment about what has to be said under the law, and that is what we will ask your Honor to keep in mind during this trial: What is new that the plaintiff has and what judgments were made and were they made in good faith, and we believe we can establish this to your Honor's satisfaction. There is

no question about it.

THE COURT: As I understand, in plaintiff's present complaint there is the representation that General Host could effect immediate control along with the company; am I correct in that?

MR. McAMIS: I believe--

THE COURT: I am asking plaintiff's counsel.

MR. WEISS: I am suggesting that the things General Host said it could do immediately on the completion of the exchange offer required operating control and without operating control they couldn't do those things, and therefore it was misstated.

THE COURT: That wasn't an issue before me, was it, on the injunction motion?

MR. McAMIS: I beg your pardon?

THE COURT: That was not an issue before me on the injunction motion, was it?

MR. McAMIS: The issue of control and the immediate ability to obtain it?

THE COURT: Yes.

MR. McAMIS: It was not so stated, your Honor. We say that the question of control was an underlying premise of the attack of Sullivan and Cromwell at that time, and in this respect it was bound up with the question

of whether or not General Host could service its debt, and Armour said, to Sullivan and Cromwell, "General Host can't service its debt based on its historic cash flow."

Now, the only reason that anybody would be interested in its historic cash flow is if one made the assumption that General Host's historic cash flow would be the only means it had available to service the debt it was proposing to issue and that could only be so if there were any considerable delays in taking over Armour's board, so that while it was not separately stated as an issue, I think that it was an underlying premise of the issue that was presented, that is, the cash flow, and, in addition, I might point out that Sullivan and Cromwell did expressly mention the staggered board problem to the SEC and that in public full page advertisements in the Times and the Wall Street Journal the staggered board is mentioned and I submit that if they didn't make it to this Court it is only because by the time the issue came to this Court it didn't think it was worth mentioning, and the plaintiff is here today making an argument that they did not explicitly present.

With that, your Honor, I will conclude my opening statement.

MR. GOULD: If your Honor pleases, I don't

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propose to rehearse for this Court either the facts which are set forth, I think, with fastidious care in briefs, or the law which has been carefully researched and presented, but simply to present what I think are the principal thrusts of the attack that is made here on these defendants and the answers to that attack.

Now, forgive me. I feel this case belongs to a category of 10b-5 cases which I call in my own little tagline "the comma bending type of case." We have had cases in this Court and elsewhere in the United States under 10b-5 in which a Kindergarten teacher would understand that a fraud has been perpetrated, where lies have been told, where earnings have been misstated, all kinds of serious things. Nobody has any trouble understanding that in terms of fraud.

And then we get the kind of cases like this where you have got to be a kind of special guru, initiated into the mysteries of 10b-5 to find out what they are talking about, especially in the situation where the same complex facts which is the target of this assault has already been the subject of the most intensive kind of scrutiny by what probably are the most qualified people in the world, high priced corporate lawyers with all kinds of aims, with all kinds of objectives, with all kinds of

prejudices and colorations have looked at this, the Securities and Exchange Commission.

The most remarkable thing about this case is that the document under consideration here is not the document that Mr. Weiss referred to a couple of times in his opening statement. Who cares about the S-1 that was filed on December 30th? Nobody ever saw it except, maybe, the lawyers that wrote it and the examiner down in the SEC. Or the first amendment. No stockholder ever saw either of those two documents. What he saw was the final piece of paper produced in the crucible, in the machine, which is supposed to turn out final papers. That is the only one we are concerned about.

So this case involves a document which is the subject of remarkable concentration and care and, by the way, approved by the Commission itself. Some mention was made of the brief interval between the time that the final draft of the prospectus got down here and the time that the registration statement was approved. One day.

And the proof will show, your Honor, that the action that was taken on this registration statement was not, as usually happens, action by the staff of the Commission, but action by the Commission itself with the concurrence of the staff.

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I mention that only as being indicative of the degree of care and attention, scholarship and sophistication which went into the approval of it, and then finally it gets scrutiny by this Court and it comes out and it goes to the public.

Now, something else about this, your Honor. I call it a "coma bending case," and I think I have proved to your Honor it is a "coma bending case."

THE COURT: Of course, it was recently called a "semi-colon case."

MR. GOULD: You can only bend half of a semi-colon, your Honor. That is my phrase, semi-colon, nit-picking, the kind of thing, "Where can I find something wrong?" That is what I really mean, where somebody with nothing much to lose, and we find them now on every corporate transaction--I haven't seen a proxy statement of any consequence, a merger of any consequence, an offering of securities of any consequence where we haven't had the inevitable stockholder suit, and most of them are junk. They are literally junk. But they cost hundreds and hundreds of thousands of dollars to defend.

With all respect, I must say, and I am just as much the subject of this criticism as anybody else, it is cheaper to pay the money, to figure out some way of

settling them, than it is to fight them out, and this is one that should be fought out, because this is a both "coma bender" or a "semi-colon case" or something like that.

Let me show you why I think so, your Honor. First of all, lest we misunderstand, we are not talking about 1975. We are not talking about the economic climate of 1975. We are not talking about the degree of stockholders' sophistication or even the sophistication of the lawyers in 1975. We are talking about 1969. We are talking about a time when a company like General Host was selling in the market at 40 times earnings, when the public was breaking down the doors to get its hands on these pieces of paper which were going to give the opportunity to participate in fantastic earnings, and the 1969, as well as the 1975, because it hasn't changed, you couldn't make earnings projections. The SEC would have have handed you your head if you came down there with a document which was based on projections, cash flow projections, earnings projections.

The principle which appears in our brief was enunciated long ago, in 1963, and as far as I know it has never been altered and the principle is that the Commission has certainly never required a company--I'm reading

from an SEC release--"never acquired a company to publicly disclose its projections and does not intend to do so. It has been the Commission's long-standing policy generally not to permit projections to be included in the prospectuses and reports filed with the Commission."

Now, that is a very, very important principle of craftsmanship in the preparation of documents like this. You can't put in your projections. You have to go to the nearest thing that anybody will permit. That is what was done here and if we ever reach the point, we will establish it to your Honor's satisfaction by the most sophisticated testimony available on the subject as to what could have been done with this and measure it against the standards, because this is a standard case.

We have got to show that people did something wrong; that they were reckless or stupid or malicious or they were looking out the window when they should have been reading their papers before we can invest them with the apocalyptic consequences of what these people want done. The stakes are enormous in these cases and that is why we settle even the most contemptible of them, and I suggest to you, your Honor, that this is perhaps the most contemptible in that sense.

Why do I say that, with all respect to my

friend? Because it comes down--this is not the case that is in your complaint, your Honor. This is what survives. You read the complaint and you see a different case, a big conspiracy case to get control, not revealing all the usual trappings of these 10b-5 cases, but we come down with two points.

There are two things he says that are wrong with this prospectus and he is under the necessity of establishing that they are wrong: That we knew they were wrong or that they were reckless in letting them happen.

What are they? First of all he says: We didn't adequately, properly set forth the impediment to getting control of the company. Let me translate it. He says this is a company with the staggered board, with the classes of directors and anybody should have understood that it was going to take you a long time to get control.

Well, I suggest to your Honor that we said so. We said it as carefully and as fully as it was possible to say. So, when your Honor gets to read this document again, you will find that we mention it and then we put all of the--

THE COURT: Where do you mention it?

MR. GOULD: We mention it in Annex A on page A-9 of the prospectus. We describe it.

THE COURT: What does it state?

MR. GOULD: Here is what we say. First of all, let me make it clear what has been done from time immemorial today--

THE COURT: Who is the "they" at this point?

MR. GOULD: The "they" is the draftsman, the people who wrote it, the lawyers, the accountants whoever worked on it for Host and they did what I think is the classical treatment. They took all of the material that related to Armour and they put it in one place, in an annex, and here it is at the bottom of page 9:

"As of December 24, 1968 General owned a million shares," and so on.

"To the best knowledge of General there are presently 17 directors of Armour. The terms of six directors expire in 1969, five in 1970, six in 1971. Armour has cumulative voting."

I suggest to the Court that is the classical language for describing this. The Armour stockholders to whom this is addressed know their company. We put the reference to it in the conventionally conspicuous place.

At page 10, immediately following the important language at page 9, at page 10 of the prospectus up front we say "See annex 8 of this prospectus for information concerning Armour."

Now, I suggest to the court that on the question of the staggered board, the most he can say is it should have been up front, and I suggest to the court that you will not find a single prospectus, in 1969, '70 or '71, where it wasn't treated exactly the same way.

Why? Because we dint -- and this is classical treatment of it: if they will put an expert on the stand to show me that there was a different or better way of doing this, I will be the most surprised man in the world. We have looked and we can't find it. This is the way it was done and, your Honor, this is the way it's being done today, because this is not the critical material. You have got to divide this up some way. You have got to compartmentalize these things.

Now, the other point that he makes, aside from the alleged inadequacy of the representation with respect to the staggered board is on the cash flow thing, and here is an interesting thing. I don't

whether Mr. Weiss realizes it, but several times during his opening to the court he said something about the presentation of earnings, about we didn't adequately project earnings. No way that anybody could ever have projected earnings. It would be cataclysmic if we had tried to do it at that time. Then, indeed, we might have had a 10b-5 case But there wasn't anything like that.

He also said to your Honor that this document was written on the assumption that Host was going to get 80 per cent. Well, I have read it several times and I look back again after I heard him say so, and I suggest to your Honor that the very composition of the schedules demonstratesd that 80 per cent was the last contingency that they assumed, that it wasn't written on any such contingency at all and that's a very tortured interpretation. Interpretation is what they did.

I suggest this to the court. I say he comes down necessarily to little points. One is, "Did you tell the whole story and did you tell it adequately with respect to the staggered board?"

I am ready to measure that against any standard he wants to create. I am ready to measure

that against any standard he wants to create. I am ready to measure that against testimony from SEC people or lawyers, the most experienced draftsman in the world.

In the end it comes down to your Honor, but your Honor has to measure it against the standard, and he comes down to the question of did we adequately disclose cash flow.

Now, there, regretfully I suggest a little ingeniousness on the part of Mr. Weiss, because he said something to your Honor but he didn't read it at all. He read to your Honor from the very important language which appears in the last full paragraph on page 9 of the prospectus, and he left out some words, because of the obvious design of this prospectus as to say to the stockholder, "If we get control of Armour we don't have very much trouble because then we combine the cash flow in Armour with our cash flow and it is easy. We have no trouble servicing the debt. There is no cash flow problem," and even the plaintiffs would assume that.

But then you have to deal with the contingency that you don't get control of Armour, and the question now is, "How do you describe those contingencies?" And again I suggest that the authors of this document

did what they had to do in classical language, what everybody has had to do in dealing with this problem, because they say -- and this is the language he left out -- "If no such merger or consolidation appears" -- first they say, "We are going to try to merge or consolidate." Then they said, "But if we don't, if no such merger or consolidation occurs and if General Host hasn't acquired more than 80 per cent of Armour common stock, which would allow it to enter into tax saving arrangements" -- and now we get into critical language -- "General Host may find it necessary or desirable to increase the dividend paid on common stock of Armour" -- possibility No. 1 -- "to incur new indebtedness" -- possibility No. 2 -- "or issue additional equity securities" -- proposition No. 3.

Now, your Honor, bear in mind, we are talking about 1969. We are talking about a time when their stock is selling at a phenomenal price-earnings ratio. We are talking a time when they had no trouble borrowing. A company which could get the market to pay the price which was put on these warrants had no trouble borrowing. The demonstration will be made that if they didn't get 80 per cent, if they didn't control the Armour cash flow, it was a cinch for

them to get the money from one source or another to carry the debt burden that was the result of the acquisition, and they say so. They couldn't make it any plainer.

"We have a burden," they say. "We have a cash flow burden, and here is the way we can handle it. If we can't get full control and increase the dividend, we will go out and borrow money, and if we can't borrow the money" -- which I regard as absurd, because it was easy to borrow the money then. They had a demonstrated capacity to borrow this kind of money. "If we can't, we will issue additional equity securities.

THE COURT: Well, I understood, though, Mr. Weiss to say that language "General Host may find it necessary or desirable to increase the dividend paid on common stock by Armour" suggests that it could acquire immediate working control or operation. You fragmentize that into three separate parts. He is referring to the first part.

MR. GOULD: Your Honor, even Mr. Weiss will not suggest to you that there wasn't a substantial possibility when this document issued that if they did get control they would control the dividend policies

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of Armour. But the language of the paragraph is disjunctive. "Or to incur new indebtedness or to issue additional equity."

THE COURT: Well, that relates, of course, to General Host.

MR. GOULD: Of course.

THE COURT: And the other item, the first one, using your phrases as a disjunctive reflect the representation that General Host made that they would obtain immediate control.

MR. GOULD: Your Honor, with all respect I can't imagine a more tortured --

THE COURT: Well, he is going up to the preceding sentence, both before and after consummation and exchange, to obtain control of the board of directors of Armour.

MR. GOULD: Then in the next they may find it desirable, and then they go on to say "If no merger or consolidation occurs this is what we are going to do," because they are now answering the precise question which I think is at the heart of the second project of this case: do you have the cash flow sufficient to sustain this investment?

The very problem, your Honor, which was liti-

gated before you --

THE COURT: Well, that was an argument made before me, but my ruling there is not conclusive.

MR. GOULD: No, I am not suggesting that it is. But I am suggesting that when you read this you have to read it in terms of what it is intended to convey to somebody and not how it can now be twisted into something else.

When it was written it was intended to say, "We are going to try to get control as promptly as possible. We are going to engage in the solicitation of proxies for the election of directors, so far as is possible. We are going to try to merge or consolidate these, but if we don't, this is what we are going to do."

Now, if that is to be twisted into a representationthat the stockholder notices we are sure to get control -- and that's what he is really saying -- it must isn't there. It just isn't there. I think you come down to these two things: You come down to the staggered board. You come down to the cash flow thing, and you have got to understand in approaching this case that we are talking about the state of the market, the state of the minds of people in 1969. We have got to understa. i that against all of the publicity

that had been attendant on this thing, all of these full-page ads in the newspapers, all of these Wall Street Journal analytical articles, the proxy statement itself, are the disclosures about the antitrust problems which had been litigated out there. I can't remember a case where so much of what was going on in the contest between these parties was so much exposed and so vigorously exposed and so expertly exposed.

Now, we can't just say, "Well, maybe -- maybe somehow, somebody might somewhere have read this to mean 'We are going to get control tomorrow.'"

I don't see it. It is not here. Now we are down to really torturing the words.

I think that we have said enough in the briefs now about this staggered board. I don't think there's a question of fact left about the cash flow. I think it's been squeezed out, and that's all there is to the case. Not the complaint. Not the big superconspiracy, these clandestine meetings referred to. All that is washed out. You come down to these two things. Did any stockholder believe on the basis of what's in this paper that Host was going to move in tomorrow and get control overnight from this company.

Secondly, did Host conceal, did Host mis-

inform, did Host fool anybody about what it would have had to do to sustain the cash flow between the moment when it got the final returns on its exchange offer and the day when it finally got control of the company? That's the whole thing.

THE COURT: Does anybody else want to be heard?

MR. ROSENTHAL: Your Honor, at this time I don't intend to make a separate opening on behalf of the defendant Pistell, but we fully subscribe to the elegant arguments stated by Mr. McAmis and Mr. Gould.

MR. DUFF: Your Honor, on behalf of Allen & Company we certainly wish to subscribe to the remarks of the defendants' counsel and to Mr. Gould's remarks. Allen & Company, Inc., as Mr. Gould pointed out, was the dealer-manager in this exchange offer. It wasn't the issuer; it was the dealer-manager. Allen & Company has certain relationships with Allen & Company, Inc., with which your Honor is familiar, and also those relationships by agreement with the plaintiff have been spelled out in rather great detail in the stipulated facts. I do point out, and I am sure your Honor will keep this in mind as the parties will, that the dealer-manager in this case was Allen &

Company, Inc. Allen & Company, Inc. had been the underwriter of securities of General Host Corporation in previous periods. It had also been the underwriter of securities on behalf of a subsidiary of General Host Corporation for a year or two years before this, but it was Allen & Company, Inc. that had placed certain securities in a private placement on behalf of General Host Corporation that it acted as the underwriter inthis case, and I believe that we will show your Honor that it was those relationships that existed with General Host Corporation which were relationships on behalf of Allen & Company and not Allen & Company.

Thank you, your Honor.

THE COURT: Now, does anybody else want to be heard?

Before we take our mid-morning recess I want to ask a question.

On page 25 of the pretrial order there is one sentence I don't understand.

On the fourth line from the bottom, "In addition, General Host $9.4 million which said indebtedness will become payable in August, 1969 in the event General Host acquires more than 50 per cent of Armour's outstanding shares."

What does that mean? Is something missing there? Maybe I should understand it and I don't. You gentlemen have made such eloquent opening statements. Maybe you can clarify that for me.

MR. WEISS: On page [illegible] of the pretrial order.

THE COURT: Do you see what I am referring to?

MR. GOULD: I think it's a typographical error.

THE COURT: Is something missing?

MR. GOULD: Probably.

THE COURT: You mean it went through the hands of some brilliant and distinguished lawyers?

MR. GOULD: Yes.

THE COURT: I have another question to ask --

MR. MC AMIS: I am sorry to say there are a couple of others.

THE COURT: Well, I am not raising any question right now with respect to the others. There are others.

MR. WEISS: Your Honor, I think I can help on the first one.

I think we should take out "which said."

"Indebtedness would become payable in August" et cetera.

THE COURT: In other words, eliminate "which said."

Are you all in agreement on that? Well, why don't you look at it in the recess?

I have one other question to ask you gentlemen.

The plaintiff, with respect to liability, finds its position; states --

MR. WEISS: Is this in the brief, your Honor, or in the proposed --

THE COURT: You have somewhere in your reply brief. On the issue of standards of determining liability, and you quote from the Chris-Craft Industries case -- is whether plaintiff has established that defeendant either knew of the misstatement or material omitted or, two, failed or refusal to entertain such facts when they were available to him or could have been discovered by him with reasonable effort, and if I understand the defendants, they claim that the applicable standard, quoting from the same case, at page 362 and 363, "In determining whether section 14(e) violations

were committed in the instant casewe shall follow the principles developed under Rule 10b-5 regarding the elements of such violations" -- then ellipsis, and they go over and say, "As for concept of culpability, intent to defraud is not an instant dispensable element in a private action under Rule 10b-5. Knowledge of falsity or reckless disregard for the truth may be sufficient.

I am going to ask you gentlemen if there is a difference set forth in those two standards, even though you both quoted from the same language, from the same opinion.

(Recess.)

THE COURT: All right, proceed, please.

MR. GOULD: When we recessed, your Honor intimated you would like to get some comments on your questions. Would you like them now? Mr. Goldschmid could probably address himself to the question your Honor raised about the duality of the Chris-Craft language.

MR. GOLDSCHMID: Your Honor, this language is used in both 10(b) and 14(e) cases. It says, your Honor, page 42 of the defendant's brief memorandum, where we cite about a dozen cases that indicated that

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10(b) and 14(3) are the same. The Circuit Court of Appeals has made that clear. If we didn't have Second Circuit cases, your Honor, we could cite the arguments of plaintiff's brief at page 7 where he too concedes that that is true. Again with numerous citations.

Now, the language that you referred to, your Honor, is something of a problem. Scholars have had some difficulty with it. It's language in the end that if one word was left out -- that (2) should have the word "reckless" after it. I suppose it was left out because it was indicated earlier in the opinion, in the language we quote, your Honor, at page 51 that reckless disregard was in fact the standard. The Second Circuit again en banc indicated that in the Lanza case. It's been indicated time and time again, your Honor, and, indeed, your Honor, on occasion plaintiff's present counsel participated in Vogel v. Brown, discussed at page 52 and 53 of our memorandum. The same kind of negligence argument was made before Judge Wyatt and on summary judgment motion, your Honor, the plaintiff's case was thrown out of court.

There is no doubt, your Honor, it seems to me, that the standard in this circuit is reckless disregard of the truth. In this content, a complete

failure to weigh gross negligence is outrageous conduct in some degree, and for us it makes sense in the context of the kind of damages that might be involved in the situation such as this.

I may add, your Honor, if this were an SEC action, it would be a close question, and for me it would make sense for a negligence standard to apply. There, where the government is a plaintiff, that would be the case.

THE COURT: What do you think was left out of the sentence?

MR. GOLDSCHMID: Before that (2) it should be "reckless failure or refusal to ascertain such facts. That was the standard that Judge Timbers makes very clear in his language quoted in Chris-Craft on page 51 of our brief. If it needed to be made clearer, it was made clearer in the en banc decision in Lanza.

There is no reason to have different standards under 14(e) and 10(b). The courts have said it continually and the standard in this circuit is manifestly recklessness.

MR. WEISS: Your Honor, I just want to make it clear that I didn't leave that language out. What Mr. Goldschmid submitted is saying that the court

left it out.

THE COURT: Yes, but isn't it correct that in all the subsequent cases, certainly the en banc decisions make it perfectly clear what the standard is in this circuit, and it does seem to me that this imports a negligence standard when mistakes could have been discovered by him with reasonable effort.

THE COURT: It seems to me to be inconsistent generally with the holdings, and right with the statement in the major opinion.

MR. WEISS: Actually, you Honor -- and I would like to brief this --

THE COURT: You brief it. We won't discuss it any further.

MR. WEISS: All right.

THE COURT: All right. Let's proceed. Call your first witness.

MR. MC AMIS: Your Honor, excuse me. Before we do, as your Honor correctly pointed out there are some errors in the pretrial order. We are agreed among ourselves with the real matters are and they are mainly dates or numbers. Should we take your time now or just fill it in.

THE COURT: Suppose you fill it in. I will

give you the original, and we can handle it that way. Each change can be initialed.

MR. MC AMIS: We will do that over the luncheon recess.

MR. WEISS: Your Honor, the first thing I would like to do is introduce in evidence -- I think we might have some confusion, because I'm not going to go in the order of the designations that we have in the pretrial order.

Now, we can start a numbering system anew, because I don't intend to put everything that we have designated in evidence, or else we can just adopt the numbers that existed in the pretrial order.

THE COURT: No. I think we ought to go in chronological order here. You offer documents in evidence and they will be received.

MR. WEISS: I would like to offer as Plaintiff's Exhibit 1 --

MR. MC AMIS: Excuse me, your Honor, I beg your pardon, but we have understood that it was the court's instruction that we prenumber all exhibits. Exhibits have been prenumbered.

THE COURT: Oh, they have.

MR. MC AMIS: Pursuant to the list in

the pretrial order, and I suggest it is going to be rather chaotic if we now use another order.

MR. GOULD: I join in that. If your Honor will look at page 39 of the pretrial order, they have gone to an enormous amount of work here to premark these things and number them, and the sequence was Mr. Weiss' sequence.

MR. WEISS: Well, that's not exactly true.

MR. GOULD: We didn't impose any sequence on him. That's the way they were handed to us, and if we are going to change numbers here we are going to spend hours and hours in the purely mechanical chore of changing numbers.

MR. WEISS: Well, I will introduce this as Plaintiff's Exhibit 21. It's the appendix to the record on appeal in United States of America vs. Armour & Company and General Host Corporation, proceeding from a decision of the United States District Court for the Northern District of Illinois.

MR. GOULD: No objection.

MR. MC AMIS: No objection.

MR. DUFF: No objection.

(Plaintiff's Exhibit 21 was received in evidence.)

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THE COURT: Is there any particular portion that you want to call my attention to.

MR. WEISS: Yes.

MR. MC AMIS: Your Honor, I beg your pardon. I am getting to the admission of that, not for the truth but for the fact that that proceeding was held.

THE COURT: All right.

MR. WEISS: I don't quite understand that.

MC AMIS: That those things occurred.

MR. WEISS: It's an affidavit by Mr. Ashton as president of General Host.

MR. MC AMIS: There's nothing wrong with the affidavit, your Honor, but I'm just saying there are a number of other proceedings which --

THE COURT: What are you offering as material evidence in so far as the issues in this case are concerned that is contained in that exhibit? I am not going through the whole exhibit, because if you want me to go through the whole exhibit, I will ahve you sit here while all of it is read.

What is the portion that you are offering in evidence?

MR. WEISS: I understand. I am offering the affidavit of Harris J. Ashton in oppositionto the government's petition for an injunction which was filed January 27, 1969 and appears on page 60 of the appendix, which was marked Plaintiff's Exhibit 1, and, in addition, I want to read in the portions of that affidavit that I think are relevant, and in addition I am offering the comments made on page 166 of the appendix, which is the transcript of the hearing before Judge Hoffman, which indicated comments of Mr. Jenner, who was there appearing as attorney for General Jost.

Perhaps the best place to start is with Mr. Jenner.

MR.GOULD: I will object to Jenner's comments.

THE COURT: One thing at a time. Ypi are offering the affidavit of Harris J. Ashton?

MR. WEISS: That's correct, your Honor.

THE COURT: You are offering the affidavit in its entirety?

MR. WEISS: Well, there are certain portions but I think it might be easier if we just put the whole affidavit in evidence.

THE COURT: The reason I am asking that

question is because I am going to call your attention to this immediately. I just turned one or two pages of this affidavit and, you know, you can't take one portion of it and disregard the rest of it. I caught this statement on page 64, paragraph 12:

"Moreover, only six of Armour's present directors are standing for election at the coming meeting. Therefore, even if every presently outstanding Armour share were to attend it is not possible for General Host to elect more than six directors out of 17."

MR. WEISS: That's the portion I want to put in evidence especially.

THE COURT: And you think that favors your position?

MR. WEISS: Of course. They are making statements just the opposite.

THE COURT: Except this pending lawsuit was referred to in this prospectus.

MR. WEISS: Well, I would like to read these portions because I think this really focuses right into my contention.

On page 63, paragraph 10, Mr. Ashtor states:

"Even if General Host acquires a controlling

stock interest in Armour through its exchange offer, it doesn't appear possible under Armour's present certificate of incorporation and bylaws for General Host to elect a majority of Armour's directors at the 1969 annual meeting, which is presently scheduled to be held February 21, 1969. It might not be possible for General Host to control Armour by electing a majority of its directors prior to the 1970 annual meeting."

Armour's certificate of incorporation and bylaws, which are attached hereto as Exhibits D and E respectively, provide that the board of directors shall consist of 17 persons divided into three classes -- and then if I might paraphrase, he goes into the numerical requirements of the vote.

And he continues at the top of the next page:

"From the foregoing calculation it can be seen that General Host's present holdings of just over 1,000,000 shares of Armour stock are sufficient to guarantee election of no more than one director in 1969. At most, two directors might possibly be elected by General Host if some of Armour's stockholders do not vote."

Then he states in the language you just read, your Honor, and he continues after that:

"Of course, it is highly unlikely that all outstanding stock will be tendered. Certainly, General Host has no reason to suppose that Armour's present management will tender its stock. Therefore, realistically, General Host cannot expect to own enough stock to elect more than four or possibly five directors at the 1969 annual meeting, even if General Host obtains valid proxies to vote the stock from all persons who would tender to it."

Then at the bottom of that page, the last sentence in paragraph 13:

"The present management clearly controls the members of the board and the executive committee."

Paragraph 14:

"So long as the present management retains a majority position on the board of directors and the

executive committee, it can continue to control and operate Armour for a considerable period of time. Thus, even assuming that General Host acquires a majority stock interest in Armour through the exchange offer, it may control Armour for a considerable time."

THE COURT: What is the date of that request?

MR. WEISS: January 27, 1969, but two days before the language that is contained on page 9 of the prospectus was filed with the SEC.

THE COURT: Is this the lawsuit or one of the lawsuits that is referred to in the prospectus?

MR. WEISS: This is the one that--I believe, yes, it was the one that was started by the Government under the Packer's case.

MR. McAMIS: The date of the affidavit was January 23rd rather than January 27th.

THE COURT: I will accept that.

MR. WEISS: It was filed in Court on the 27th.

In describing this proceeding on page 9 of the prospectus under "antitrust aspects," the prospectus, which we may as well mark right now and introduce in evidence as Exhibit 23, your Honor--

MR. McAMIS: No objection.

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(Plaintiff's Exhibit 23 received in evidence.)

MR. WEISS: The prospectus states:

"The Federal Court rejected this theory and held that this"--

THE COURT: What page are you reading from?

MR. WEISS: Page 9 of the prospectus, your Honor the middle of the first paragraph in that section:

"The Federal Court rejected this theory and held that this decree does not forbid acquisition by General Host of a controlling stock interest in Armour."

THE COURT: I don't suppose this is very important. Do you have the right date on that affidavit, because the first sentence in that paragraph reads: "On January 21, 1969 General Host would complete dismissal of a legal action instituted the day before by the Department of Justice."

Wasn't the affidavit before the Court?

MR. McAMIS: Could I explain that? The dates are correct. What happened was that at the hearing on January 21st Judge Hoffman rendered his decision and then said that General Host, which had filed no papers up till that time, would have a few days, if it desired, to put in some papers in order to make a record if the case ever were appealed, so the affidavit was put in a couple of

days after the hearing but before the final order was entered in the District Court.

THE COURT: Proceed.

MR. WEISS: Your Honor, I would like to now read the statement by Mr. Jenner made before Judge Hoffman or made to Judge Hoffman in that hearing which is on page 166.

THE COURT: Before you read it, I see counsel is on his feet to make an objection so you'd better let him state his objection and let me see what you are offering and then I will rule.

MR. GOULD: I don't understand that we are bound by anything that Mr. Jenner said at that time. I am going to object to it on that ground.

THE COURT: It all depends on the nature of the statement, whether it is argument or what it is.

MR. GOULD: It is a little difficult to characterize and I don't think they ought to take out pieces like this. I don't think it has any probative value. He has the affidavit.

Another point is that I don't think it is admissible against Allen & Company, Incorporated.

MR. McAMIS: Your Honor, as I say, I have no objections to the admission of this transcript or of the

actual affidavit for the facts that those proceedings took place and that what was said was said, but I do object in general to the admission here of hearsay proceedings, of other proceedings which are hearsay, and we are going to come to several of them that Mr. Weiss has not admitted. That is the ground for my objection.

THE COURT: What is that hearsay as far as your client is concerned?

MR. McAMIS: This particular one is not, your Honor. I am just pointing to the fact that there are others that are and I think other statements in the transcript may very well be hearsay, but if he has got counsel's stipulation of what action is said in that affidavit, then why can't he use it in the normal way of cross examination of Ashton.

THE COURT: Let me see what there is here.

MR. WEISS: I want to preface this by reading--

THE COURT: I haven't ruled yet. I said I want to see what it is. There has been an objection. I can't rule without seeing what is offered. Why should that statement by Mr. Jenner in any respect be binding as far as the Allen & Company, Inc. and Allen & Co. defendants, the two defendants, are concerned? What is the theory? Why is it binding?

MR. WEISS: It will be subject to connection that I can prove a conspiracy as against them.

THE COURT: I suppose in that theory I will have to take it subject to connection subject to a motion to strike.

Let me see what it is, in any event.

MR. WEISS: It is at page 166 of Exhibit 21.

(Pause.)

THE COURT: I don't understand the basis of your objection. Is this any different from what Mr. Ashton set forth in the affidavit?

MR. McAMIS: Not in substance, no.

THE COURT: Why are we spending time on both sides? Plaintiff had the statement under oath by the principal officer of General Host.

MR. GOULD: That is what I meant when I said it doesn't have any probative value.

THE COURT: It will be received for whatever probative value it may have. The Court is sitting without a jury and the Court will only consider relevant evidence in making its determination.

MR. GOULD: I think the Court is also concerned with volume.

THE COURT: It is. If I tore that one page

out, how much difference do you think it would make in this whole record?

MR. WEISS: Your Honor, I would like to now introduce the testimony of Timothy T. Day to a deposition taken of him in this proceeding.

"Q Will you please state your name, sir?

"A Timothy T. Day.

"Q What is your home address?

"A 21 Deer Run Trail, Weston, Connecticut.

"Q What is your present occupation?

"A I am group vice president for General Host Corporation.

B2 "Q How long have you been in the employ of General Host?

"A Since 1968.

"Q What did you do before that?

"A Before 1968?

"Q Yes.

"A I worked for Trans World Airlines.

"Q In what capacity?

"A Several capacities."

MR. McAMIS: Objection, your Honor, on the ground of relevance.

THE COURT: You are taking just as much time

stating your objections as it takes to read it. It takes just as much time. What difference does it make?

MR. WEISS: Your Honor, he is again an employee.

THE COURT: All right. Move on.

MR. WEISS: The answer was being read.

"A Several capacities. I was controller of the eastern region on the last job that I had with TWA.

"Q What were your duties as controller?

"A I was responsible for the financial operation of the eastern region of the sales and service organization of the airline.

"Q How long did you occupy that position?

"A Six months to a year.

"Q What was your occupation before that?

"A The job before that at TWA?"

THE COURT: I will sustain the objection. Let's not spend time on that. The objection is renewed and sustained through page 6. You may ask the question: "What was your undergraduate work?"

I thought you men did your homework on this and streamlined this and got down to the basic essentials.

MR. WEISS: If they will stipulate that he was

a financial expert and he was in the employ of General Host in that capacity, I don't have to read this.

THE COURT: Move on to the next thing.

MR. WEISS: "Q What was your undergraduate work?"

Is that where your Honor wanted me to start, at the bottom of page 6?

THE COURT: How about the question before that answer? Pick it there.

MR. WEISS: Yes.

"Q Did you obtain a degree at the Harvard Graduate School of Business?

"A Yes, I did.

"Q In what?

"A I didn't concentrate in any particular field.

"Q What was your undergraduate work?

"A Undergraduate work was at Wesleyan, degrees in mathematics. BA in mathematics.

"Q Now, would you just run through your employment history with General Host starting with the beginning and running through the present?

"A June of 1968 I joined as vice president of acquisitions. Sometime in 1969 that was changed to

vice president of planning and development. I think in that same year it was later changed to vice president and treasurer.

"In 1973 it was changed to group vice president.

"Q To whom did you report as vice president of acquisitions?

"A To the president, Harris Ashton.

"Q As vice president of planning and development?

"A I reported to Harris Ashton. At some point he became chairman of the board. I am not sure of the date, but I continued to report to him."

Going on to page 8:

"Q When did you first hear of Armour & Company in your capacity as an employee of General Host?

"A In August 1968.

"Q What was your first contact with Armour? In what manner did you hear of them?

"A We were purchasing a block, or were considering the purchase of a block of stock from Gulf & Western.

"Q Who first mentioned Armour to you?

"A I'm not sure. I'm not sure. It would

be either Harris Ashton or Dick Pistell.

"Q Do you remember the circumstances?

"A Well, the circumstances related to this proposed purchase of a block of stock from Gulf & Western.

"Q Was it communicated to you orally or through a memo or at a meeting?

"A Orally.

"Q Well, by whom?

"A One of those two. I don't remember.

"Q Do you know the date that it was first mentioned?

"A It had to be around the early part of August which was--if my memory serves me correct, it was around the 5th of August, the 5th or 6th of August that we made the commitment. So it would have to have been sometime in that vicinity. Just prior thereto."

Your Honor, taking into consideration the statement you just made about cutting this down, what we are trying to establish here is that Mr. Day prepared a confidential study of Armour under instruction of Harris J. Ashton, sometimes referred to as the "black book" and that he indeed did prepare this and it was issued in October of 1968.

If the defendants will so stipulate, I think we

can knock out a number of pages.

MR. McAMIS: I would stipulate, your Honor, although I don't understand the relevance of the fact of dealing with what happened in October 1968. I don't see what it has to do with the prospectus, but I stipulate that it is a fact.

MR. GOULD: On the statement that was made by Mr. Weiss, I am going to object to anything that happened in October. What has it got to do with this prospectus? We know what his case was about. It is not about what is in the complaint. Why do we have to take this big wind-up back to October?

THE COURT: What is its relevance?

MR. WEISS: There are sections contained in that report that focus on the problem of getting control and it is being developed and introduced on the issue of scienter.

THE COURT: I'll receive it.

MR. GOULD: I don't know how he can try a case this way.

THE COURT: I don't understand why you don't understand. Here counsel asserts and I must take his statement that there are references in that confidential report as to the issue of control, which is one of the

items which you gentlemen have seemingly agreed to.

MR. GOULD: That is right.

THE COURT: It is before me. Why isn't it relevant?

MR. GOULD: That part of it, not the whole thing.

THE COURT: I don't understand this bickering going on. You are supposed to be very experienced lawyers. You can't get down to the guts of the case without anybody making a speech with respect to matters that are irrelevant and assume the Court will only consider relevant matters.

MR. GOULD: No, your Honor.

THE COURT: If you want to try the case reading the depositions, we will do it and you will sit here with me. We'll start.

MR. GOULD: I want to do it as quickly as possible.

THE COURT: No. You'll excuse me, but I think you are being captious in your arguments. If you have an objection, state it. You have a duty to your client. You don't have to make a stipulation. Go ahead with what you have got there, read it. Let's not spend time. This always happens with lawyers who are supposed

to be seasoned and experienced. They say they will expedite matters but when it comes down to the actual trial it is anything but that.

MR. GOULD: Won't you at least allow me to justify what I said? We have spent endless amounts of time in marking these depositions. The length of time is not my doing or the doing of anybody here, but hundreds of pages have been marked as to what it is they wanted to read.

THE COURT: He suggested that he can eliminate all the markings by a simple stipulation that a certain report was prepared, at which point an objection was offered on the ground that the matter he referred to is not relevant.

I hold that what he states is relevant. That is all there was to it.

B3 MR. GOULD: If that is the way your Honor understood the offer, then I agree that my objection would be captious.

THE COURT: That is what I understood him to say. Did I misstate your position?

MR. WEISS: I don't think so, your Honor. I'm quite confused by Mr. Gould's statement. Your Honor, I attempted to get the stipulation prior to the trial.

THE COURT: That is the offer that is made, Mr. Gould.

MR. GOULD: That offer is accepted.

THE COURT: It is accepted.

MR. GOULD: That offer.

THE COURT: Where is that memorandum? Offer it in evidence according to its number and then point out the specific portions that are involved. You don't have to read those 200 pages there to get to that one item.

MR. WEISS: Your Honor, this is Plaintiff's Exhibit No. 8 and I in particular refer your Honor to the section--

THE COURT: I don't have the exhibit. Will somebody hand it up?

MR. WEISS: The section which starts on page 122 entitled "legal implications."

On page 125--

THE COURT: This is a very bad copy, but all right, "legal implications." What is the specific reference?

MR. WEISS: Please go to page 125, your Honor. There is a section outlining the staggered board provisions and then we go--

THE COURT: I take it the election of directors

Where do you go from 125?

MR. WEISS: To the top of page 127.

THE COURT: Through to 127?

MR. WEISS: I'm sorry. Yes, because then you have the meeting of directors and then on page 127 we start with adoption of resolution concerning merger through amendment of articles of incorporation, amendment of bylaws and that is the end of that portion.

THE COURT: It would be through page 129, am I right?

MR. WEISS: That is correct.

THE COURT: All right.

MR. WEISS: I think this copy might be a clearer copy, your Honor. I'm willing to make a trade.

THE COURT: It is not better than the other copy, but I will do the best I can. Go ahead.

MR. WEISS: If you will go to page 17:

"Q Did you have in mind the price being offered when you concluded whatever you did conclude about the consistency of the earnings of Armour?

"A Yes.

"Q You came to the conclusion that the price being offered, based upon that analysis was a fair price?

"A I thought it was a fair price, given the size of the block.

"Q What does that mean?

"A That I thought the block, in itself, had value.

"Q For what purpose?

"A I feel that any sizeable block of stock generally has more value than a small size block; than a small position in a company."

THE COURT: I take it this is referring to the Gulf & Western block?

MR. WEISS: That is correct.

MR. McAMIS: Right, your Honor. Therefore, I object to this going any further because it relates to a point in time that relates to purchases that are not involved in this lawsuit.

MR. ROSENTHAL: I would join in that objection, your Honor.

MR. WEISS: The next answer I think might answe it.

THE COURT: Go ahead.

MR. WEISS: Yes.

"Q Why?

"A Because it offers a number of things.

It offers, first and foremost, the ability to sell that block to someone seeking control of the company. It offers the ability to--if it is a sizeable enough block, to influence the operation of the company and perhaps improve the operation. It offers a vehicle, as a third alternative, of seeking control yourself.

"Q Now, what sized block did you have in mind at that time?

"A At that time the sized block that was being discussed that Gulf & Western had or was offering for sale.

"Q Was it the first purchase or the option portion?

"A I was looking at the total picture. The purchase plus the option.

"Q Which was how many shares? Do you recall?

"A I think it was 150 and 600,000 or 750,000 shares. It was something over 10 per cent of the total outstanding.

"Q Did you consider that block as an investment without the control aspect attached to it?

"In terms of valuing it and determining whether or not the price being offered was reasonable for

General Host's investment. Did you say that two of the criteria used in evaluating that block was the ability to, one, influence the management of the company and two, the potential for control?

"A I said potential.

"Q Did you evaluate the block without that factor?

"A I don't recall whether I isolated those particular factors in evaluating that block.

"Q Would your conclusion have been different if the control factor was absent from your analysis?

"A I'm not sure.

"Q Is it your testimony that that was an integral ingredient or aspect of the analysis, so far as you were concerned?

"In determining whether or not the price being offered was reasonable.

"A I thought the size of the block was an integral part of the value that offered a potential that might lead to control.

"Q In your mind, that was one of the factors in determining whether or not the price being offered was a reasonable one as a General Host investment?

"A The size of the block did influence, yes.

The size of the block.

"Q And the potential for control?

"A That was one aspect of it."

Go down to line 17:

"Q Do you recall what price was being paid to Gulf & Western at that time?

"A I believe it was in the vicinity of $60."

Go to page 21:

"Q Did you come to any conclusions yourself about General Host's financial ability to make the purchase, absent the availability of outside resources?

"A Are you referring to the purchase of the--

"Q 750,000 shares.

"A 750,000 shares? It was evident that some form of outside financing would be necessary."

Now the defendants have designated lines 15 through 25 of page 22 and the top of page 23, lines 2 to 10. Do you want me to read that?

MR. GOULD: Sure.

MR. WEISS: All right.

"Q Did they tell you what they had in mind in terms of purchasing this block for General Host?

What they intended to do with it?

"A At this point in time?

"Q Yes.

"A It was my understanding that it was an investment.

"Q An investment for what purpose?

"A An investment as an investment.

"Q To hold.

"A An investment to hold, yes.

"Q To resell?

"A That was a possibility.

"Q To obtain a dividend yield?

"A Certainly if we invested, we would obtain the dividend yield.

"Q Was it anticipated that the market price of the securities would increase in value through normal market conditions?

"A We certainly did not buy it with the anticipation that we would lose money on the investment."

I skip to page 30, unless you want me to read any designations on page 29.

MR. GOULD: Our next designations are at page 26.

MR. WEISS: I'm skipping.

MR. GOULD: Just a minute.

(Pause.)

MR. SOLOVAY: Is it clear, your Honor, that we have an objectionto the black book, Plaintiff's Exhibit 8, on the grounds it wasn't connected with us nor did we see it.

THE COURT: I assumed the objection was made on both the Allen defendants.

I didn't understand that there was any objection with respect to the black book. I understood that after the stipulation that was offered, it was understood, as the court understood it, there was no objection to it.

Am I wrong about that.

MR. GOULD: My position with respect to it was that the objection was aimed at the entire book. When it was reduced to things that were called to your Honor's attention --

THE COURT: Yes, I understood that only that portion is in.

MR. MC AMIS: My objection states an October document, which is out of this case, particularly in view of the stipulated facts at 28 of the stipulated facts here.

MR. GOULD: I understood when I made that point your Honor indicated it might go into the state

mpa2 "Day

of mind through the period of the offering by the prospectus and I conceded it might.

THE COURT: All right. Then the record is clear.

MR. GOULD: The only thing I want to make sure that there is no intimation on the part of the plaintiff that the All defendants, either of them, knew about the black book or ever heard of the black book. He's not suggesting that yet, and then your indicated you would take it, I think subject to connection.

THE COURT: Subject to connection and subject to a motion to strike, but it goes into the conspiracy point.

MR. GOULD: We aren't urging that he knew about it at this point.

MR. WEISS: I am trying to cut out as much as I can, your Honor.

THE COURT: Mr. Weiss, this was exactly what I referred to when I suggested counsel do their homework with respect to these depositions. This is a common failing in all these trials. There are thousands and thousands of pages -- I'm not criticizing that part of it, because under the rules it may be relevant to the

mpa3 "Day

subject matter in suit, but relevant to the subject matter in suit is not the same thing as relevant to the subject matter on trial.

When you come to the point of trial, you have all this excess material, and nobody takes the time to go through it and prune away what is not relevant and simply offer basic evidence.

To save time, I had intended to sit until 1 o'clock and have an hour's recess for lunch. We will adjourn now and resume at 20 to 2.

I suggest that this be done by all parties who are going to offer deposition testimony.

(Luncheon recess.)

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AFTERNOON SESSION

(2:00 p.m.)

MR. WEISS: Continuing from the deposition of Mr. Day.

Your Honor I will announce the pages that I am starting out so that we can all follow it. We are going to commence at page 48, line 24, of the Timothy Day deposition:

"Q Now, when you got to the point of acquisition of control, did you consider, whether it's in the report or not, what financial requirements General Host would have in order to maintain the control position without merger?

"A Well, would you elaborate on that question a little bit? What exactly are you driving at?

"Q In your mind, did you believe that once you got 51 per cent of the outstanding common stock of Armour & Company, that you could merge the two companies?

"A In my mind?

"Q Yes.

"A In my mind it seemed to me that once we had 51 per cent, we would either -- we could either move to 80 per cent for consolidation of tax returns,

mpa2 "Day

or move to a merger. One of those two steps probably could be accomplished.

"Q Did you analyze how long it would take to accomplish those steps?

"A No, I did not.

"Q Did anybody ask you?

"A No, they did not.

"Q Did anybody tell you or give you an opinion as to how much time it would take?

"A You are talking in this time frame of reference? No.

"Q At any time.

"A Well, at some time in time we certainly talked about how long would it take to accomplish a merger.

"Q When was that?

"A I am not sure that it didn't occur after the February 14 date you are referring to.

"Q I am not sure I understand your answer.

"A I said, talking to your frame of reference, what I have done up to February 14, 1969.

"Q Do you recall any such discussion before February 14?

"A Before February 14? There may have been discussions, but I don't recollect exactly what those

mpa3 "Day

discussions might have been.

"Q Do you recall having such discussions prior to February 14?

"A To accomplish what, specifically?

"Q A merger.

"A To accomplish a merger?

"Mr. McAmis: And the time it would take to accomplish it.

"Q Let's start with number one.

"Did you discuss merger at all prior to February 14?

"A Prior to February 14? Yes, I'm sure that merger was discussed.

"Q Who did you discuss it with?

"A I believe I discussed it with -- the potential, the possibility of merger was probably discussed with counsel and probably with Ashton and Pistell.

"Q Is there any one of those three that you specifically recall having discussed it with?

"A I don't recall a specific conversation. But I think that like in the prospectus we indicate that the possibility of the merger existed. So, it had to have been discussed."

Turning to the bottom of page 52.

mpa4 "Day

MR. MC AMIS: Your Honor, we designated the balance of that page, and most of page 52, in fact all of page 52 not designated by the plaintiff.

MR. WEISS: All right. I will read tht.

"Q Do you recall who you discussed it with?

"Mr. McAmis: He has given you --

"A Probably one or all of those three people.

"Q So, it is your best recollection that you discussed it with all of them?

"A As a possibility.

"Mr. McAmis: That's not what he said.

"Q Is that your best recollection?

"A What was the question again?

"Q That you discussed it with all of them.

"A No. I said I probably discussed it with any one of those three.

"Q Did you discuss it with Mr. Ashton?

"A I don't recall a specific conversation.

"Q Do you recall discussing it?

"A I don't recall specifically discussing it.

"Q Do you recall specifically discussing it with Mr. Pistell?

"A No, I don't recall any specific discussion.

"Q Do you recall discussing it with Mr.

Pistell?

"A I'm sure I discussed it with -- certainly I'm fairly sure I discussed it at some point with Mr. Downey. Whether or not I did with Mr. Ashton or Pistell, I would guess I probably did. But, I don't recall a specific discussion.

"Q Do you recall anybody talking to you about the time that it would take to merge?

"Mr. McAmis: This is prior to February 14?

"Mr. Weiss: Right.

"A I don't recall a specific time frame. That was discussed."

This is plaintiff's designation.

"Q Did anybody discuss with you any legal obstacles to merger?

"A Yes.

"Q Who?

"A I am not sure who. But, certainly, one of the attorneys. It would be my guess it would be Mr. Downey.

"Q Tell me what was said to you?

"A I don't recall the specifics except that as I recall, Armour was a Delaware corporation. There

are certain ownership requirements, stock ownership that's required. We had the bylaws. The bylaws and certificates of incorporation of Armour & Company.

"I am sure that they contained -- it is my recollection they contained certain legal implications regarding a merger. One of which, as I recall, was a vote, a favorable vote by the majority of the board. There may have been others. I just don't recall.

"Q Was there any discussion about the makeup of the board?

"A The makeup of the board?

"You mean who was on the board?

"Q Yes.

"A Yes, there was.

"Q What was discussed?

"A Well, we discussed each of the individuals from time to time. Maybe not each of them, but, who was on the board. Their ownership position in the company. Their conflicts of interest. The fact that it was staggered. There might have been other items. I don't recall."

Turning to page 56 --

MR. MC AMIS: Your Honor, we had

designated the balance of 54 and 55. I am willing to waive the reading of those at this time.

THE COURT: All right.

MR. WEISS: "Q Do you recall discussing, prior to February 14, the effect of Armour's staggered board requirement?

"A I told you we discussed the staggered board.

"Q What did you say about that?

"A Well, as I recall, it was a staggered board, something like one-third of the directors came up for election every year.

"Q What did that mean to you at that time?

"A That one-third of the directors came up for election every year.

"Q Did you conclude then that if Armour obtained fifty-one per cent of the outstanding stock --

"A You mean General Host?

"Q Yes -- General Host obtained fifty-one per cent of Armour's outstanding stock, pursuant to the tender offer, that at best it could elect one-third of the board in the next ensuing meeting of shareholders?

"A Well, that would appear evident, but I don't remember such a discussion.

"Q You don't recall discussing that?

"A Not at that point in time.

"Q Did you discuss cumulative voting at all?

"A Yes, we did.

"Q What did you discuss concerning cumulative voting?

"A Just that it was cumulative voting.

"Q You were aware that Greyhound was making a competing tender offer, were you not?

"A At some point in time when they announced their intention.

"Q At that time, did you analyze the effect of Greyhound being able to acquire a substantial minority positionupon the ability of General Host to place members on the Armour board?

"A We certainly did in some time frame. But I am not sure -- I am not sure it was prior to the February 14 meeting.

"Q You don't recall discussing it prior to February 14?

"A In terms of placing board members?

"Q Yes.

"A No.

"Q Did you consider that a first step towards merger would be the placing of members on Armour's

board?

"A Yes, we did.

"Q Did you think you had any chance to accomplish a merger without General Host's representation on the Armour board?

"A Without any representation on the board?

"Q Right.

"A Without any representation?

"Q Without any.

"A I'm sure we discussed that.

"Q What did you conclude?

"A We concluded that if our tender offer was effective, which meant that we had over fifty some odd percent of the outstanding shares, that we would have representation on the Armour board.

"Q Did you discuss how the members of the existing Armour board might vote if faced with a proposal for merger without General Host's representation on the Armour board?

"A And with General Host owning over fifty percent of the stock?

"Q Yes.

"A I don't recall a specific discussion. But I am sure that we discussed that.

"Q Do you recall any conclusions that were reached?

"A I am of the impression that our conclusion was that if we owned over fifty percent of the outstanding shares of the company, that we would not have a major obstacle in merging the two companies.

"Q What led you to that conclusion?

"A I am not sure what specifically led me to that conclusion, but I generally believe that, even today, that in most instances, that that -- at least I believed it at the time and I generally believe it today -- that a shareholder that has over fifty percent of the shares in the company can generally effect a merger.

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"Q Did you determine then that you could effect a merger if you owned more than 50 per cent?

"MR. McAMIS: You are talking about Mr. Day's determining this? Th's is a legal matter. You are asking him what he determined in connection with that?

"MR. WEISS: I want to know what his state of mind was.

"MR. McAMIS: What his understanding was?

"MR. WEISS: That's right.

"MR. BROWN: Personal understanding?

"MR. WEISS: Personal understanding.

"MR. McAMIS: If he had any.

"A What my personal understanding was as to--what was the question again?

"Q As to whether or not you could absolutely effect a merger.

"A Absolutely effect a merger?

"Q Yes.

"A I don't think I had a conclusion that we could absolutely effect a merger.

"Q Did you believe that there was a possibility to effect a merger?

"A It was my belief that we could probably effect a merger if we owned over 50 per cent.

"Q Did you quantify that possibility in any way?

"A No, I did not.

"Q Did you determine how long it might take?

"A I didn't.

"Q Did you determine what financial capabilities General Host would require to sit in a control position without merger?

"A Are you talking about prior to--

"Q Prior to February 14th.

"A Prior to February 14th, no.

"MR. BROWN: Note my objection to the form of the question. I am having a little trouble understanding how you can sit in a control position without having a merger.

"You mean having 50 per cent of the stock without having the effective control? I don't understand the question."

THE COURT: Why do we need the lawyer's comments about that?

MR. WEISS: I think that is an admission that having a 50 per cent interest doesn't mean having effective control.

THE COURT: I am going to make an observation

with respect to a matter that came up this morning. The statement was offered by Mr. Jenner. How often have I charged the jury that arguments by lawyers are not a substitute for evidence? Why are we spending so much time on it? The evidence is what the witnesses have said and done.

The parties who are involved in this matter and the arguments and contentions of the lawyers are not evidence. I think we ought to get that clear at the beginning of the trial.

On my own motion I am striking Mr. Brown's colloquy. It doesn't mean anything.

MR. WEISS: I am willing to not read any of the colloquy.

THE COURT: I didn't ask you to read the colloquy.

MR. WEISS: I asked Mr. McAmis.

THE COURT: I made my statement now that the arguments of lawyers are not a substitute for evidence, particularly on a deposition when they hassle with one another.

MR. WEISS: Can I make a suggestion on the defendants' side that I eliminate all that colloquy?

MR. McAMIS: I have no objection to the elimina-

tion of colloquy, your Honor.

THE COURT: I'm supposed to get evidence and the evidence is what the witnesses testify to. Isn't it as simple as all that?

MR. McAMIS: I agree.

MR. WEISS: I think we were to the answer at line 16.

"A We had more than 50 per cent. But we did not end up with control right away, as it turned out.

"Q Why?

"A We did not control the board of directors.

"Q What stopped you from controlling the board of directors?

"A What stopped us from controlling the board of directors immediately was the staggered board system."

I now turn to page 66, line 10.

THE COURT: I would have thought you wanted the next question and answer on the bottom of that page. This is a mystery to me. You read things that are I regard as really irrelevant and what seemingly bears on your position you ignore.

MR. WEISS: I'm sorry.

THE COURT: Don't you want to read the bottom

question and the answer on the top of the next page?

MR. WEISS: I did, yes. Apparently I missed it.

THE COURT: That is unless counsel object to my suggesting it.

MR. WEISS: This is at the bottom of page 61.

"Q How did that prevent you from controlling the board of directors?

"A It stopped us from controlling the board of directors in not only one-third of the board of directors were elected at the annual meeting.

"Q Could you elect all of those directors that were up for election because of your 51 per cent ownership?

"A No, we could not.

"Q Why not?

"A Because of cumulative voting.

"Q Which did what, in effect?

"A Which permitted, in effect, Greyhound to--Greyhound or others--let's say the other shareholders, to elect a nominee.

"Q Just one?

"A Frankly, I don't recall how many were up for election that first year. Was it four or three?

I don't really remember. My recollection is that we--was it four? I don't recall how many were up for election."

THE COURT: Now go to the question that you intended to read.

MR. WEISS: That is at page 66, line 10:

"Q Did you review portions on pages 9 and 10 under the categories 'other aspects of the exchange offer' or 'information concerning Armour' or 'effective exchange on Armour stockholders who accept offer'?

"A May I take a look at it?"

We are referring to the prospectus.

"A Yes."

I hand it to the witness.

"A Yes.

"Q You reviewed all those portions that I quoted?

"A Yes, I did.

"Q Now, a portion of page 9 under 'other aspects of the exchange offer' reads 'General Host intends to act promptly, both before and after consummation of the exchange offer, to obtain control of the board of directors and management of Armour.'

"What did you believe that to mean at the time you reviewed it?

"A That we would act promptly to obtain control of the board of directors of Armour.

"Q What did control mean to you then?

"A Control meant to obtain a majority of votes, a controlling interest. Control of the majority of the board of directors.

"Q Did you discuss that with anybody prior to February 14th?

"A Discuss that statement?

"Q Yes.

"A I discussed that statement. I'm sure that statement was discussed with counsel.

"Q Did you discuss it with Mr. Ashton?

"A I don't recall discussing specifically that statement with him.

"Q Did you discuss it with Mr. Pistell?

"A I don't recall discussing it with him. I may have discussed it with either or both, but I don't recall such conversation.

"Q Did you discuss it with any other board member?

"A Well, counsel in this case would probably be William Downey, who was a board member.

B2 "Q Mr. Ashton was also a member of the

Lovejoy firm at that time, wasn't he?

"A Yes, he was and is.

"Q So, when you talk about discussing it with counsel, whom are you referring to?

"A I am not referring to Mr. Ashton. I am referring to the practicing lawyers. I don't know if Harris is considered a practicing lawyer of the firm. I am referring to practicing lawyers of that firm, which would be working for Mr. Downey."

THE COURT: I take it that the "Harris" refers to Mr. Ashton; is that right?

MR. GOULD: Yes, your Honor.

MR. WEISS:

"Q Did you inquire as to the legal implications of the statement made on page 9 that I just quoted?

"A As to the legal implications?

"Q Yes. What would be required to get that control?

"A I believe the answer to that would be yes.

"Q What was the information given to you?

"A That we would have to have--we would have to have a majority of the board of directors.

"Q How long would that take, according to

what you were told?

"A I'm not sure I was told how long that would take.

"Q Did you come to any personal conclusions concerning how long it might take?

"A You are talking about prior to February 14th?

"Q Yes. At the time you reviewed the text of Plaintiff's Exhibit 1."

Which was the prospectus.

"A My personal conclusion--and again, I am not sure that this was--I don't know if--this is my personal conclusion only; was that it would probably not take a great deal of time to obtain control of the board of directors.

"Q How did you anticipate it would happen?

"A I anticipated--I personally anticipated that owning 50 per cent or more of the stock of the company, that the board of directors would quickly be turned over--relatively quickly--relatively quickly would be turned over to General Host.

"Q You mean by resignation of the existing board members?

"A By resignation or special stockholder

meetings.

"Q At a special stockholders' meeting did you anticipate that General Host would cause the election of a majority of the board?

"A I frankly don't recall the legal--what legally can transpire at a special stockholders' meeting. But, I was under the impression that through a special stockholders' meeting, that it would be possible to obtain a majority of the board of directors. I'm not sure exactly how I arrived at that conclusion at that point.

"Q Do you recall whether it was by virtue of an election or through resignation of existing members?

"A I don't recall--I told you, I don't know how I arrived at that conclusion. I don't know what steps, at this point.

"Q Now, the next sentence reads on page 9:

'In this connection it may engage in the solicitation of processes for the election of directors of Armour and other matters, both at the February 21, 1969 annual meeting of Armour & Company, and otherwise.'

"What did'and otherwise' mean to you at that time?

"A I don't recall what it meant to me at that time. But, I presume it meant possibly such a

special stockholders' meeting.

"Q Did you believe that by calling a special meeting or holding the February 21, 1969 annual meeting, and through the solicitation of processes for election of directors of Armour, that General Host could, through these processes obtain control of the board of directors of Armour?

"A Restate the sentence again. Would you read the question back?"

The question was read.

"A My personal opinion?

"Q Yes.

"A The answer would be yes.

"Q You read the text that I quoted on page 9 to mean that; is that correct?

"A I would generally believe that's correct.

"Q Now, also on page 9, the following is stated:

'General Host may find it desirable upon consummation of the exchange offer to propose to stockholders of the relevant corporations a merger or consolidation of it or its present or future subsidiaries with Armour or certain of its subsidiaries; or General Host may find it desirable to dispose of portions of the

assets presently held by it or by Armour.'

"Do you recall that sentence?

"A Yes, I do.

"Q I believe you previously testified that you analyzed the bylaws and certificate of incorporation, et cetera, of Armour.

"I further believe you testified that in order to merge the companies, you thought that you would require a vote of the majority of the board of directors of Armour to accomplish such merger.

"Is that an accurate statement of what you believe?

"A Well, it's not quite accurate. The by-laws--I read the bylaws and certificate of incorporation. They were analyzed by legal counsel. It is my recollection that that was one of the requirements.

"Q When you read the portion of page 9 that I most recently quoted, did you consider that a fact, and whether or not it should be included in that prospectus?

"MR. McAMIS: What fact?

"MR. WEISS: That a majority of the board of directors--a vote of the majority of the board of directors of Armour would be required to effect a merger.

"A I believe I considered that fact.

"Q Did you discuss it with anybody?

"A I am--I believe I probably discussed it with general counsel.

"Q Did you discuss it with any other board member?

"A Mr. Downey, again, is a board member and general counsel. I believe that if I discussed it, I would have discussed it with him.

"Q What did he say to you about it?"

Then, your Honor, they interposed the attorney-client privilege and blocked that inquiry.

Proceeding to page 74, line 17:

"Q When you talked to Mr. Downey, did you know he was a director?

"A I knew he was a director."

Then Mr. McInnis directs him not to answer any further questions on that line.

Going to page 75:

"Q Did you mention to anybody the fact that you believed that a majority of the board of directors would be required to propose a merger between the companies, between Armour and General Host before February 14th?

"A I discussed it with Mr. Downey."

The defendants designate lines 14 to 17, which

read:

"Q Did you personally believe that such a disclosure should be made in the prospectus?

"A I do not--I don't find it necessary. Again, speaking not as an attorney."

Proceeding with the plaintiff's designations:

"Q I refer you to a portion of that same paragraph which reads:

'If no such merger or consolidation occurs, and if General Host has not acquired more than 80 per cent of Armour's stock, which would allow it to enter into tax-saving arrangements, General Host may find it necessary or desirable to increase the dividend paid on common stock by Armour, or to incur new indebtedness or issue additional equity securities.'

"What did you then believe was required in order to cause Armour to increase its dividends?

"A To increase its dividends, I believe it required a vote of the board of directors.

B3 "Q Did you believe that the Armour board, as it was then constituted prior to February 14, 1969, would vote for such an increase in dividends?

"A I don't know what they would have voted.

"Q Did you have any personal feelings about

it?

"A My belief--if General Host were not in the picture, that they probably would not--absent General Host in the picture, that they probably would not increase the dividend."

Proceeding to page 79, line 12:

"Q Now, that same paragraph there is reference to '$4.20 in annual interest payable on the $60 principal amount of general shareholders' 7 per cent debenture.

"Do you see that?

"A Yes, I do.

"Q Did you do any analysis as to how General Host would make those payments?

"A Yes. Yes, I believe there was an analysis on how General Host would make those payments.

"Q Did you do it?

"A I certainly participated in it. I don't know if I was the only one who prepared that.

"Q Who else participated in it?

"A I don't recollect who else would. But, I certainly was involved.

"Q Did you discuss it with Mr. Ashton?

"A I'm sure I did.

"Q And with Mr. Pistell?

"A I'm sure I did.

"Q Did you discuss it with Price, Waterhouse?

"A With Price, Waterhouse? I don't know.

"Q You don't recall?

"A I don't recall, no.

"Q Did you do any written analysis?

"A Did I do any written analysis? I believe there were work papers prepared.

"Q What did you conclude would be used to pay that entry?"

Then it was rephrased.

"Q Well, did you conclude that the interest could be paid out of the operations of General Host?

"A As I recall, the work papers indicate depending on various levels of ownership of Armour & Company. It would depend where the funds would come from.

"Q Let's start with the 51 per cent ownership.

"A 51 per cent ownership. At 51 per cent ownership, the interest payments would have to come from internally generated funds at General Host, plus the dividends, whatever they might be, from Armour & Company.

"Q Would those two items alone support the

interest payments?

"A They would not for any extended period of time.

"Q What else would be required?

"A General Host--several things, possibly, would have to happen. Additional financing would be required to finance those payments.

"Dividends from Armour would have to be either increased--would have to be increased as one alternative; or they would have to be divestitures within General Host to finance the payments of interest for any extended period of time."

Going to page 84:

"Q Did you ever have any discussions with anybody from Allen & Company or Allen & Company, Inc., concerning that aspect of the tender?

"A I don't recall such--there were meetings with Allen & Company. But whether this sujbect was raised, I don't really know. I don't recall."

We are referring to the question of the ability to pay the interest, your Honor.

"Q You attended meetings with representatives of Allen?

"A Yes, I did.

"Q When I use the word 'Allen' I am referring to one or both of the two entities.

"A I understand that.

"Q Did you make any distinction between the two entities when you met with these people?

"A Did I make any distinction? Meaning that one--

"Q Between Allen & Company--

"A They were two different firms, but they both were dealer-managers.

"Q Both Allen & Company and Allen & Company, Inc.?

"A No. I thought you meant Kleiner, Bell. I'm sorry. No, I never made any distinction between Allen & Company--

"Q And Allen & Company, Inc.?

"A No. I never did. I thought you were talking about Kleiner, Bell.

"Q Who from Allen did you have discussions with prior to February 14, 1969?

"A With Herbert Allen. Charlie Lobe.

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"Q Are you saying Herbert Allen, Jr.?

"A Junion. Charlie Lobe. Andthere was another guy who was a vice president of the firm. I don't recall his name.

"Q Approximately how many meetings did you have with one or more of those individuals prior to February 14, 1969?

"A I would guess somewhere between five and maybe more. But, probably in the vicinity of five. Five to ten.

"Q During those meetings did you discuss the financial aspects of General Host's involvement with Armour?

"A Yes, we did. Not every meeting, butin some of the meetings.

"Q When was the first meeting?

"A It would have been some time in December. I don't know when, exactly.

"Q Aside from meetings, did you have any telephone conversations with them?

"A Up to February.

Q Prior to February 14th?

"A Yes, I had telephone conversationswith them.

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"Q Approximately how many, would you say?

"A Numerous. I couldn't -- I really don't know.

"Q I take it that during the tender offering period, you had many?

"A Yes. That's right.

"Q Because they were dealer managers?

"A Yes.

"Q How about prior to the filing of the S-1?

"A I did not have numerous telephone conversations during that period. We had, again, probably these four or five meetings, probably in that time frame. During December, I guess it would be.

"Q That is prior to the filing of the S-1?

"A Yes, yes."

Now, pages 88 and the top of 89 are designated by the defendant.

Do you want me to read that in?

MR. MC AMIS: No.

MR. GOULD: I don't recall that that be read.

MR. WEISS: Page 89, line 12:

"Q Now, do you recall discussing with Allen people the manner in which General Host would obtain

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the funds to pay the interest on the debentures being offered pursuant to the tender offer?

"Mr. McAmis: Prior to February 14th.

"A I don't recall such a discussion -- I know at one point -- I'm not sure. I can't put a time frame. And I didn't participate in the discussion. I was under the imrpession that Allen & Company was going to arrange financing for a $10,000,000 -- I believe it was ten million dollars of loans that was going to have to be repaid in August of 1969. But I did not participate in such sidcussions."

Page 92, line 22:

"Q You were given instructions to prepare that study, were you not, the first study.

"A The first study, yes.

"Q Who gave you those instructions.

"A I believe they came from Harris Ashton, although I think that Dick Pistell also had an input into that."

Your Honor, defendants designate page 100.

MR. GOULD: I will waive that.

MR. MC AMIS: So will I, your Honor.

MR. WEISS: Turning to page 109 --

MR. MC AMIS: I just want to point out

mpa4 "Day

that between page 101 and 109 there are some more that I have designated. Mr. Weiss is going so fast that I haven't had time to designate anything, but I am willing to waive it.

MR.GOULD: I will waive anything up to 109.

MR. WEISS: Your Honor, any defendant, I suppose, can put in any portion on their case.

"Q Was there an internal calculation as to what these warrants would be worth as part of the package?

"Mr. McAmis: What their predicted market value would be?

"Mr. Weiss: Yes.

"A Yes, the answer is yes.

"Q Who did that?

"A Essentially,we relied on the opinion of our investment bankers or dealer-managers. Although we also interjected -- we, meaning I and Mr.Ashton -- also interjected his own thoughts into what they might be worth.

"Q Were opinions rendered toyou by your dealer-managers concerning that question?

"Mr. Solovay: Oral or written

"A Oral or written?

mpa5 "Day

"Q Any kind.

"A Yes, I believe opinions were rendered.

"Q Were there any written opinions?

"A I don't recall any such written opinion.

"Q I assume then that they were oral?

"A I believe they were oral.

"Q Who rendered them?

"A Well, there were opinions rendered throughout this whole process of trying to establish values and what package made the most sense. I would say the final package which was decided the night before or the night that it was annnounced, that the opinion would have been rendered by Herbert Allen, Jr., and Bert Kleiner in conjunctin with Harris Ashton and Dick Pistell."

MR. GOULD: I will waive the next on that page.

MR. WEISS: Going down to line 18:

"Q Did anybody report to you that such a meeting or conference call took place?

"A I believe my recollection is that I was advised" --

MR. MC AMIS: That's not part of the plaintiff's designation, your Honor. The plaintiff's designation starts --

mpa6 "Day

MR. WEISS: I will read the whole thing. Line 13:

"A I don't recall specifically a meeting. But, I presume that there was a meeting or at least a conference call of sorts.

"Q Did you participate in any way?

"A I didn't on that meeting.

"Q Did anybody report to you that such a meeting or conference call took place?

"A I believe my recollection is that I was advised if such a meeting took place.

"Q Who advised you?

"A I presume it was Mr. Ashton or Mr. Downey."

Do you want me to read the next portion?

MR. GOULD: No, we didn't ask you to read that.

MR. WEISS: Page 132.

MR. GOULD: I will waive that.

MR. WEISS: 136.

MR. GOULD: I will waive 136.

MR. WEISS: 137.

MR. GOULD: We will waive that.

MR. WEISS: 139.

MR. GOULD: Waived.

mpa7 "Day

MR. WEISS: 141, yours, line 5:

"Q Did you think there was a reasonable prospect that you would get eighty percent when you first considered the possibility of tender?

"A When we first considered the possitiliby of tender, I thought there was a reasonable prospect of getting perhaps as high as eighty per cent.

"Q When Greyhound entered into the picture, what was your thinking on that?

"A When Greyhound entered the picture -- of course, I don't believe we knew or I knew how successful Greyhound was or how successful they were during their tender offer until after they announced their results. But, certainly, we knew -- or I believed that that would lessen the possibility of getting a number such as eighty percent."

Defendants designate 143 and 144.

MR. GOULD: We will waive 143. I will waive 144.

MR. WEISS: 154 is defendants' designation.

MR. GOULD: We will waive 154.

MR. WEISS: 155, line 11:

"Q Did there come a time when you were told

mpa8 "Day

that General Host would have difficulty getting control of Armour's board? Could not, in the immediate future.

"A In the immediate future?

"Q Yes.

"A I believe that there came a time when it appeared that would be difficult.

"Q When was that?

"A Certainly at the time for the first annual meeting."

156 and 157 are defendants' designations.

MR. GOULD: We will waive 156.

We will waive 157 and the top of 158.

MR. WEISS: "Q Now, did anybody ask you to any kind of financial workup of General Host's financial position, taking into account that a merger might not be accomplished?

"A Might not be accomplished ever or in the near future?

"Q In the near future.

"A Yes, I did make up -- I did make such an analysis.

"Q When was that?

"A I am hard pressed to put a date on that."

mpa9 "Day

MR. GOULD: If your Honor please, I am going to object to any testimony with respect to what happened after the exchange offer was concluded It has no materiality or relevancy.

MR. MC AMIS: I join in the objection, your Honor, because we are testing the sufficiency of a prospectus and I respectfully submit that you can't do that by looking at events that did not take place until long after the prospectus.-

MR. ROSENTHAL: I join in that objection as well, your Honor.

MR. WEISS: Your Honor, the line of questioning will indicate that I tie it back to the pre-prospectus date, so if your Honor would permit me to read it in --

THE COURT: I will take it subject to a motion to strike on the representation made by counsel.

MR. WEISS: Incidentally, I don't accede to the defendants that that evidence of post-period events is not admissible, but I don't think it will be relevant here.

THE COURT: You say you don't think it would be relevant. If you don't think it is relevant --

mpal0 "Day

MR. WEISS: Because I am trying it back. I say even if I don't tie it back, it is admissible. The question of when goes to the weight that the evidence should be afforded.

MR. GOULD: I confess I am mystified, but maybe that's my own naivety. Could we have this understanding, your Honor, that your Honor is receiving this material now, material relating to events after the exchange offer, on the theory that they are going to be tied back to a frame of mind which existed at the critical time of the exchange offer, and if that connection is not made your Honor will entertain a motion to strike?

THE COURT: That's what I understood.

MR. GOULD: Thank you. I understood it until Mr. Weiss made his reflections; I wanted to clarify it.

THE COURT: Proceed, please.

MR. WEISS: "Q In the nearfuture.

"A Yes, I did make up -- I did make such an analysis.

"Q When was that?

"A I am hard pressed to put a date on that. I would guess it would have been in March or April of

mpall "Day

that year.

"Q Who requested it?

"A I believe it would be Mr. Ashton.

"Q Who worked on it with you?

"A I worked on it. I believe Jack Glynn worked on it, and others in the accounting department. I don't know who else that would be.

"Q Did you consult anybody from Price, Waterhouse concerning that study?

"A There may have been.

"Q Do you recall?

"A I don't recall.

"Q Did you consult anybody at Allen & Company?

"A I don't recall, really, consulting Allen & Company at that point in time.

"Q Now, was this analysis reduced to writing?

"A It was.

"Q Was it in the form of a report?

"A Yes, it was.

"Q Who was the report submitted to?

"A Well, the report was initially submitted to Mr. Ashton. Perhaps, Mr. Pistell. I don't recall. And, ultimately, that report was used in presentation

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to various financial institutions.

"Q For what purpose?

"A To obtain financing.

"Q Did you come to any conclusions about General Host's ability to meet its debt obligations in the event no outside financing could be accomplished?

"Mr. McAmis: Debt obligation at what period?

"Q At any time you were making this study? For the next year, let's say.

"A Well, the report indicated that essentially the summation of the report indicated that we needed between $40 and $50 million for financing, if we were forced to wait three years before we obtained control of the board of Armour.

"Q Did you break that down into periods within that three-year span?

A Yes, we did.

"Q What periods did you work with then?

"A Fiscal years.

"Q Now, what were your projections as to your needs to the end of the fiscal year 1969?

"A Yes, and I don't recall what each year indicated. I do recall that $40 to $50 million was

mpal3 "Day

the three-year requirement.

"Q Did anything change in General Host's operations between the time you started to make your sutdies in 1968 and the time you made the studies that I am talking about, other than the Armour tender offer?

"Was there any change, adverse or positive?

"A There were numerous changes.

"Q Material?

"A Significant, material changes, no.

"Q So that the only changes in General Host's picture really arose from the Armour situation; is that correct?

"A Essentially.

"Q Which would include the monies raised for the purchase of the Gulf & Western block, and the loans obtained from the Franklin Bank, and --

"A Union Bank and the Bank of Commonwealth.

"Q -- and the tender, is that correct?

"A That's correct.

"Q Now, those events were known or contemplated by you at the time you worked on the prospectus; is that correct? Or reviewed the prospectus marked as Plaintiff's Exhibit 1?

"A These events? Be specific.

mpal4 "Day

"Q Well, you knew that the forty-seven and a half million dollar loan was consummated?

"A Yes.

"Q You knew about the borrowing from the banks?

"A Yes.

"Q You anticipated the tender?

"A Yes.

"Q Which was completed on February 14th?

"A Yes.

"Q 1969?

"A Yes."

Going to page 164:

"Q At the time you worked out the black book study, or whatever you call it -- is that what you call a black book study?

"A The Armour study, yes.

"Q The Armour study, the conditions of General Host were no different than they were in March or April of 1969, other than the Armour involvement; is that correct?

"A The conditions of General Host's operations were not materially different. That is correct.

"Q At the time you reviewed the prospectus that

mpal5 "Day

was submitted to the SEC and marked as Exhibit 1, the conditions of General Host's operations were not materially different than they were at the time you reached the conclusion that $40 or $50 million would be needed; is that correct?

"A That is correct.

"Q At the time you reviewed the prospectus, you then knew that General Host had borrowed forty-seven and a half million dollars; is that correct?

"A I did.

"Q You also knew about the bank borrowing with Franklin, et al; is that correct?

"A Yes, I did."

That is my reading of the Day deposition, your Honor.

MR. GOULD: If you will bear with us for one moment, your Honor, while we check to see if there is anything we want to add.

There is one thing, your Honor. Page 166, the question and answer which starts at line 18.

Would you read it, please.

MR. WEISS: Yes. I just want to see if I then want to read some other parts.

Well, in that event, I will start on page

mpal6 "Day

165, line 20:

"Q Did you calculate at that time what the financial requirements of General Host might be in the event a merger could not be effected? At any time you reviewed the prospectus. At any time up until February 14, 1969.

"A The only calculation we made prior to tht that was the impact on cash flow, which I previously mentioned.

"Q What did you conclude?

"A What did we conclude? That if we only achieved a fifty percent, and not an eighty percent, that we would need to do a number of things, as set forth in the prospectus."

Now reading what Mr. Gould wants me to read:

"Q In the event you achieved fifty-one percent ownership of the common stock, but you could not accomplish merger, did you work out a cash flow requirement for General Host prior to February 14, 1959 on that basis?

"A I believe we did.

"Mr. McAmis: That basis containing both those assumptions?

mpal7 "Day

"Mr. Weiss: That's right.

"Mr. McAmis: That you obtained fifty-one percent and not merger when? Ever?

"Mr. Weiss: Not merger, let's say, within three years.

"A We did not make an assumption of not merger within three years.

"Q Did you make any 'not merger,' assumption?

"A I don't recall exactly what was set forth on that work paper.

"Q Do you recall whether it was a one-year or less assumption?

"A I believe it was only calculated on an annual basis.

"Q Do you remember what the number was for the first year?

"A We did not make -- when we computed the cash flow, and this is prior to February 14th, we did not make an assumption that we could never merge. We didn't extend that cash flow out more than one year.

"Q But you did work up a cash flow projection on the assumption that merger might not be accomplished for a period of one year?

"A We did."

mpal8 "Day

That's it, your Honor.

MR. MC AMIS: Your Honor, page 168, line 18, might I ask that it be answered on the succeeding page?

MR. WEISS: "Q Did you work under the assumption that moneys would have to be raised from sources other than General Host's internal operations?

"A Yes. I thought that was what we set forth, if you read the prospectus.

"Q Show me where it says that?

"A It says, 'If no merger or consolidation occurs, and if General Host does not acquire more than eighty percent of Armour's common stock, which would allow it to enter into a tax-saving arrangement, General Most may find it necessary or desirable to increase dividends paid on common stock by Armour or to incur indebtedness or to issue additional equity security.'

"Page 9."

THE COURT: I think we will take a five-minute recess. The reporter is under great pressure in this kind of proceeding.

(Recess.)

MR. WEISS: Your Honor, in an attempt to accommodate Mr. Bettauer's problem, I will call him.

mpal9

I hope we can finish his testimony today. I am not really as prepared on it as I would like to be, but I think it will be sufficient.

A R T H U R B E T T A U E R, called as a witness by plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WEISS:

Q Are you presently employed by Price, Waterhouse & Company?

A Yes.

Q Were you employed by Price, Waterhouse in 1968 and 1969?

A Yes, I was.

Q Were you then in charge of the General Host audit?

A Yes.

Q And was Price, Waterhouse the auditor for General Host?

A Yes.

Q Was Price, Waterhouse also the auditor for Armour at that time?

A Yes.

Q And which office handled the Armour account?

A The Chicago office.

Q And were you in the New York office, is that correct?

A That's correct.

Q Now, did there come a time when you were called upon to testify in General Host vs. Ashton, in respect to General Host's offer of exchange for Armour securities?

A Yes.

Q When was that?

A It was early in '69, I believe. I don't recall the exact date.

Q Was that in the State of Illinois?

A Yes.

Q Before the Illinois Securities Commissioner?

A That's correct.

Q Was that the only such occasion?

A I appeared in Kentucky, in Louisville, Kentucky, also, but I didn't give testimony in a formal sense.

Q The only place you gave testimony was in the State of Illinois, is that right?

A Yes.

Q And what was the nature of the testimony

you gave there?

MR. GOULD: I object to that. I don't understand the question.

THE COURT: Objection sustained.

Q When you testified in the State of Illinois, did you employ any special knowledge that you obtained by virtue of the fact that you were the auditor of General Host in giving that testimony?

MR. GOULD: I object.

THE COURT: Mr. Weiss, I think you have to put questions more specifically. This is a vague kind of question to put to a witness. I would assume that any witness who testifies, testifies from knowledge.

MR. WEISS: The question was whether he had obtained any special knowledge as auditor of General Host.

THE COURT: No, I will sustain the objection.

Q Did you testify with respect to the use of projections in compiling cash flow analyses to determine whether or not a company could service its debt and debt service obligations in the future?

A Yes.

Q And did you testify with respect to the cash flow analyses prepared by General Host itself?

A Not specifically.

Q Did you analyze the General Host cash flow analyses before that testimony?

A No.

Q Did you ever analyze it?

A No.

Q Did you ever discuss the General Host cash flow analysis with anybody in General Host at that time?

MR. GOULD: I object unless we get a time and place.

THE COURT: Yes, fix a time and place.

Q Prior to February 14, 1969.

A I don't believe so.

Q Was your testimony before the Illinois commissioner merely a theoretical observation or opinion on your part?

MR. GOULD: I object to that.

THE COURT: Now, Mr. Weiss, I don't think that that question and the answer that follows were ultimate in evidential matter with regard to the issues in this case.

MR. WEISS: For my purposes, the testimony that I have already gotten is sufficient on that point.

MR. GOULD: I didn't hear that.

MR. WEISS: I said the testimony I have gotten on that point is sufficient. I will go on to another point.

Q Did you discuss, prior to February 14, 1969 -- did you discuss with any officer of General Host the needs that General Host might require to pay its future debt in the event it made an exchange offer for Armour securities?

MR. SULLIVAN: Objection to the form.

A In a general sense, yes.

THE COURT: All right.

Q Did you discuss those items in the fall of 1968?

A I don't recall it, but --

Q You don't now recall? Is that your testimony? You don't now recall?

A There were a number of conversations. I just don't know exactly when they were.

Q Were they prior to February 14, 1969?

A Yes.

Q With whom did you discuss that?

A I would guess with Mr. Glynn and Mr. Day.

Q And did you inquire of those gentlemen as to what they believed General Host's future requirements would be if it made an exchange offer for Armour securities?

MR. GOULD: If your Honor please, I am going to object to that.

Q Did you discuss with those gentlemen the plan to seek 80 per cent of Armour's outstanding stock.

MR. GOULD: Same objection.

THE COURT: I will sustain it on the ground it is leading. If you want to ask the subject matter discussed, you may. I think we will move along if you don't put leading questions.

Q What was the subject matter of the discussions you had with those gentlemen --

THE COURT: You have three people. Can't you break it down?

Q Didn't you meet with them --

THE COURT: Who is Mr. Glynn?

THE WITNESS: Mr. Glynn was then the controller of the corporation.

Q Who was Mr. Day?

A He was a vice president. I don't recall his exact title.

Q And Mr. Kingsley?

A He was the treasurer.

Q Did Mr. Kingsley come out of the Price, Waterhouse organization?

A Yes. He had previously worked for Price, Waterhouse.

Q Did Mr. Glynn?

A Yes.

Q And did you discuss the financing that might be required with respect to that plan?

A In a general sense, yes.

Q Would you tell me what he said to you and you said to him concerning that matter?

THE COURT: Will you fix a time?

Q Was it more than one conversation?

A I would say it was a number of conversations, and it is difficult for me to visualize whether it was with one or more of the individuals at one time. It was probably late in 1968 or early in 1969, primarily.

Q Do you recall any conversations with any one of those gentlemen concerning that subject matter in the fall of 1968?

A Well, in the fall of 1968 I was aware that they had an option and a block of Armour stock and were considering the possibilities of acquiring greater amounts.

Q What amounts were they discussing at that time following the closing of the Gulf & Western project?

A I don't recall specifically but I believe it was in major amounts.

Q In excess of 51 per cent?

A I would guess so.

Q Did they discuss the possibility of obtaining 80 per cent?

A Yes, I believe so.

Q And in relationship to those conversations, did you discuss with Mr. Glynn how General Host would finance those purchases and the future debt obligations resulting therefrom?

A Well, it was my understanding that they would issue debentures to acquire -- and make a tender offer to acquire 51 per cent, and it was their belief that once they had at least 51 per cent it wouldn't be difficult to obtain the financing necessary to bring that up to 80 per cent.

Q Was 80 per cent a special number that had some import?

MR. GOULD: I will object to that.

Q Was there any financial benefit to getting 80 per cent that was discussed with them.

MR. GOULD: I don't want to be captious about it, but, your Honor, he can ask him whether there was any reference to 80 per cent without the editorializing.

THE COURT: He is accepting your suggestion.

Q Was thereany reference to 80 per cent.

A Well, when a company is owned 80 per cent it can be consolidated for income tax purposes and there are certain tax advantages to be gained by that.

Q Now, did you discuss what would be required to consolidate the figures of the two companies at an 80 per cent ownership level, to afford General Host tax savings?

A No. I assume at an 80 per cent level there would be no question about the ability to consolidate Armour for tax purposes.

Q Did you so advise Mr. Glynn?

A No. He didn't direct such a question

mpa28 Bettauer-direct

to me. That would havebeen discussed with a tax partner.

Q You didn't discuss it with him?

A No.

Q Did you discuss it with Mr. McDowell?

THE COURT: Who is Mr. McDowell?

MR. WEISS: I am sorry.

Q Mr. Day?

A We may have discussed it in a general way but not in the sense that I was being asked if it was -- if they met specific tax requirements.

Q In what way did you discuss it?

A Well, there were certain benefits to be obtained if they owned 80 per cent.

Q Aside from the tax benefit, was there any other?

A Not specifically, no.

Q Was there any other discussion concerning General Host's ability to finance a 51 per cent ownership without getting 80 per cent?

A Well, the financing was contingent on the exchange offer, which in turn was contingent upon obtaining 51 per cent.

Q Was there any discussion about General

mpa29 Bettauer-direct

Host's ability to maintain a 51 per cent ownership without reaching an 80 per cent ownership?

A Yes. As shown by the pro forma statement.

Q I am asking about conversations.

A Well, we discussed the showings of the pro forma statements to the effect that they would operate at a loss at a 51 per cent or a 60 per cent ownership.

THE COURT: When you say they would operate, you are talking about General Host?

THE WITNESS: The combined companies would have operated at a loss on a pro forma basis, I should have said.

Q Now, would that loss require General Host to obtain additional financing to meet its debt obligations.

MR. SULLIVAN: Objection.

THE COURT: I will allow it.

Q Did you discuss that with them?

A I believe we discussed it that they could hold out for a certain amount of time without financing.

Q What amount of time?

A I don't recall.

Q Was it more or less than a year?

A I would think more than a year.

Q That they could hold out more than a year?

A Yes.

Q That was discussed with them?

A I don't recall that specific item being put in those words, but in general that was my impression.

Q Do you recall testifying at a deposition in this case on January 20, 1975?

A Yes.

Q Do you recall having been asked the following questions and giving the answers --

MR. SULLIVAN: What page?

MR. WEISS: Page 44, line 24 -- I am sorry; line 11.

Q -- "Q Did you inquire to how General Host intended to meet the debt service on the debentures being issued and how it intended to repay the moneys borrowed during 1968?

"A Yes."

Do you recall that?

A Yes.

Q "Q Whom did you inquire of?

"A I guess Jack Glynn, the treasurer, and

mpa31 Bettauer-direct

Kingsley and possibly others.

"Q Had Mr. Kingsley previously been employed by Price, Waterhouse?

"A Yes.

"Q In what capacity?

"A I believe he had been a senior on our staff.

"Q At the time you made those inquiries that you just testified to, what was Mr. Kingsley?

"A He was the treasurer.

"Q Of General Host?

"A Of General Host.

"Q What did they inform you when you inquired?

"A Well, in general it was their hope to obtain 80 per cent of Armour and that on a consolidated basis as shown by their pro forma statement there would be adequate coverage. It was their belief that if they obtained 51 per cent that it wouldn't be difficult to obtain the balance.

"Q The balance of what?

"A Of securities representing 80 per cent of control.

"Q When did they inform you of those beliefs?

"A During the fall of 1968.

"Q Was it prior to November 22, 1968?

"A I believe so.

"Q Did you inquire of them how they intended to meet those obligations in the event they could not increase their ownership to 80 per cent?

"A I believe it was apparent that if they obtained a majority but less than 80 per cent, that they would be headed for a difficult time.

"Q It was apparent to you?

"A Yes.

"Q Was it apparent to them as they expressed it to you?

"A I believe so, yes.

"Q Who told you that?

"A It was shown in the pro forma statement and I believe Kingsley, Glynn and Day all commented on it."

Do you recall having --

MR. SULLIVAN: Objection. There is no prior inconsistent testimony. No reason to ask the question.

THE COURT: Well, I think he is referring to a different time. I will overrule the objection.

The rest, of course, is consistent with what he testified to here.

MR. WEISS: That's correct, your Honor, but there's a portion of it that isn't.

THE COURT: That's your statement. You said "a difficult time." I don't know how much further you probed it.

Q All right, Mr. Bettauer, you just testified I believe that if they reached 80 per cent they could be consolidated, is that correct, for income tax purposes?

A Yes.

Q How about for reporting purposes?

A For reporting purposes there would be a presumption that they could consolidate at 51 per cent.

Q Consolidate?

A Yes.

Q Is there a difference between consolidation and combining statements?

A Yes. Consolidation implies a parent-subsidiary relationship, and combined statements generally are prepared when there is not such a relationship.

Q When there is not a parent-subsidiary relationship?

A That's right.

Q Did you review the prospectus that was issued

in connection with the exchange offer by General Host for Armour securities?

A Yes.

Q And what was the form of the preparation in that respect?

A It was an income statement showing the historical results on the basis of a 51 per cent ownership, a 60 per cent ownership, an 80 per cent ownership and a 100 per cent ownership.

Q And that was a consolidated or combined presentation?

A Consolidated.

Q It was on a consolidated basis?

A Yes. Or is it combined?

Q I would like to show you page 14 of Plaintiff's Exhibit 23.

Is that a consolidated presentation or a combined presentation?

A It actually is prepared on a consolidated basis, but it was labeled pro forma combined statement.

Q Were you consulted with respect to the inclusion of that combined statement in the prospectus?

A No.

Q And did you give any opinion with respect

to it?

A No.

THE COURT: At page 38, the top of the page -- all right. I will withdraw that.

Q Did you certify that statement?

A No, sir.

Q Did you render any opinion with respect to that statement?

A No.

Q Did you render any opinion to Allen & Company or Allen & Company, Inc. with respect to that statement?

A No.

Q Did you render any opinion to General Host with respect to that statement?

A No.

Q Did you express an opinion with respect to the priority of the conclusion of that statement?

A No.

Q Personal as opposed to a firm opinion?

A No.

Q Now, you said that a combined statement was intended to be used in what situation?

A There really is no difference between them except that the word "combined" statement is usually

used where you combine two corporations which, let's say, are owned by a common owner but they are not consolidated; they are combined, to distinguish between the consolidation of a parent with its subsidiary. Generically I guess the word "combined" could be used with respect to consolidated statements as well, which it is here.

Q But the common usage is when two companies, company A and company B, have the same parent, you can combine those two companies?

A If you wish to exclude the parent, yes.

Q And the consolidated statement is intended to be used in a parent-subsidiary relationship?

A That would be the normal usage.

Q And you say normally if it was more than a 50 per cent owned subsidiary it would be a parent-subsidiary type of relationship that would call for a consolidated statement?

A That's correct.

Q Now, are there any exceptions to the general rule of when to consolidate a parent-subsidiary situation?

MR. GOULD: I object to that. I don't understand that there's any general rule here.

THE COURT: Objection sustained.

Q Is there a generally accepted accounting principle that governs the manner in which consolidated statements should be employed?

A Yes.

Q And what is that rule?

A I believe it is Accounting Research Bulletin 51, but I could have that number wrong.

Q That's correct. Is it generally referred to as an ARB51?

A Yes.

Q And is there an exception to the more than 50 per cent ownership rule as expressed in ARB51?

A Yes.

Q Now, what is that exception?

A Well, where the intent is to hold the subsidiary for only a temporary period or where there is an inability exercise control.

Q So that if there's an inability to exercise control, ARB51 states that a consolidated or combined presentation shall not be used, is that correct?

A They refer sspecifically to consolidated. That's correct.

Q Did you review this prospectus issued by General Host?

A Yes.

Q At the time it was used by General Host?

A Yes.

Q And did you review the portion thereof that deals with a $9.4 million obligation that was due in August of 1969?

A Yes.

Q That would have been less than a year after the presentation of the prospectus; is that correct?

A That is correct.

Q And normally is an obligation, a short term obligation due in less than a year?

A Normally, yes.

Q Was it carried as a short term obligation in this prospectus?

A No, it was shown as long term.

Q Do you know why?

A Yes, in conformity with the bulletin that deals with working capital, and I believe that is Accounting Research Bulletin 5, where a long term obligation is scheduled to fall due within a year and there is an intent to refinance it, then that obligation may be shown as long term with disclosure of the intent to refinance it.

Q The intent in and of itself is sufficient to carry it as a long term debt; is that what your testimony is?

A That is what that Accounting Research bulletin says, although that was not our--the basis on which we made the evaluation.

Q Was that Accounting Research bulleting operative at that time in 1968?

A Yes, that is quite an old bulletin.

Q Was it followed generally by the accouting profession?

A Yes, the intent in and of itself as expressed by the client to the auditor was sufficient reason to permit the inclusion of the short term indebtedness as a long term debt on his balance sheet.

MR. GOULD: That is not what he said.

THE COURT: Is that your testimony?

THE WITNESS: That is what the Accounting Research bulletin said, yes.

Q And that was the generally accepted accounting principle operative at that time?

A Yes.

MR. SULLIVAN: Objection, argumentative.

Q Did you have as the auditor in order to make that determination as to how to carry the indebtedness try to satisfy yourself by sufficient evidential support that the intent was a real one and could be accomplished?

A We did it in this case, but I don't believe it was required according to my interpretation of that bulleti

Q And you did it in this case; is that correct?

A Yes.

Q On what did you rely to satisfy yourself?

A Essentially two things, a representation by management in a letter they wrote to us that it was their intent to refinance and, secondly, a letter from Allen & Company that it was feasible to refinance.

MR. WEISS: I would like to mark this. This is Defendants' Exhibit A57 and I would like to introduce it as a Plaintiff's Exhibit.

XXX (Plaintiff's Exhibit 60 marked for identification.)

Q I show you Plaintiff's Exhibit 60, marked for identification, Mr. Bettauer, and ask you if that is the letter that was relied upon by you in determining the propriety of carrying a 9.4 million dollar obligation as a long term debt?

A Yes.

Q The one that was due in August of 1969?

A Yes, this is the letter.

MR. WEISS: I would like to introduce this in evidence as Plaintiff's Exhibit 60.

MR. SULLIVAN: No objection.

MR. GOULD: No objection.

XXX (Plaintiff's Exhibit 60 received in evidence.)

Q This is a letter from Allen & Company; is that correct?

A Yes, sir.

Q And it is dated February 4, 1969 and it reads in the last paragraph:

"This letter is not a firm commitment. Any financing would be subject to market conditions at the time."

Is that correct?

A Yes.

Q Now, the fact that it is carried as a long term debt doesn't mean that General Host did not have to go out and borrow money to pay it; is that correct?

A That's correct.

MR. GOULD: I object to this. It is argument. I don't think it results in any evidence.

THE COURT: You may answer.

Q Is that correct?

A Yes.

Q You didn't examine the cash flow projections that General Host had prepared; is that correct?

A That is correct.

Q So you don't know whether or not this 9.4 million dollar obligation was included in that cash flow projection; is that correct?

A That is right.

Q Did you subsequently find out whether it was or

wasn't?

A No.

Q Do you recall discussing with any General Host officer prior to February 14, 1969 the question of whether or not General Host might have to hold out financially in order to get control of Armour's board of directors in the event that it only achieved a 51 per cent ownership?

A I can't recall a specific conversation on that point, although I have the feeling it was generally discussed.

Q With whom?

A I don't recall.

MR. WEISS: I am referring to page 85 of Bettauer's deposition.

Q Do you recall the following questions and answers at your deposition in this proceeding:

"Q This memorandum commences by stating, 'General Host is seeking additional financing totaling $24 million which would be drawn down in installments commencing August 1969 through the first quarter of 1971.'

"Do you recall having read that?

"A Not specifically, no.

"Q The second paragraph commences by stating, 'The purpose of this financing is to insure that

General Host will have adequate financial strength so that even under the most adverse circumstances it will successfully gain complete control of Armour & Company. This means that General Host must be prepared to operate without complete control of Armour until the first quarter of 1971, the longest possible holding period before General Host has a majority of directors on Armour's board of directors.'

"Do you recall having read that?

"A No, although I remember having discussed that.

"Q When?

"A Sometime in the fall of 1968.

"Q With whom?

"A I believe Glynn and Tim Day, but I am not sure.

"Q Was it definitely one of those two?

"A Yes.

"Q And it might have been both?

"A Yes."

Do you recall those questions and those answers?

MR. SULLIVAN: Objection for two reasons. What is being referred to in the deposition being read is an April 1969 report and, the second reason, there is nothing

inconsistent in the witness' prior testimony that warrants going into this.

THE COURT: I assume that the witness' answer would be a discussion prior to February 14, 1969.

MR. WEISS: That is correct.

MR. GOULD: It is complicated, although it is something that I just observed and--

THE COURT: A little complicated, you say?

MR. GOULD: I have got to join in the objection. He is now being questioned about this memorandum. He has referred to what he said in his deposition, but the man testified that he never saw this report that he is being questioned about.

The question is asked of him on the same page, line 6:

"Q Do you recall having seen the index on the second page?

"A No. It is possible that I saw this, but I don't recall having seen it. There are sections of it that look familiar."

Then he is questioned about it and if he said he had seen it.

THE COURT: I think we are drifting a bit afield here. Mr. Weiss, I think your questions ought to

be put to this witness, who is a live witness before the Court, with respect to his recollection as to whether or not he had any discussions, fixing the time and date and you, of course, may offer to him any document that may refresh his recollection. It doesn't make any difference what the document is, but I think you ought to put direct questions to him and get direct answers.

B2 Q Do you recall discussing with either Mr. Glynn or Mr. Day prior to February 14, 1969 the possibility that General Host would have to hold out until sometime in 1971 before it could get control of Armour or get operating control?

A No. I recall them expressing the converse, that if they obtained 51 per cent that they did not believe it would be difficult to obtain additional shares, but I don't recall specifically discussing what the consequences would be if that did not take place.

Q You don't recall discussions with either of those gentlemen concerning the possibility that they could only get 51 per cent and not 80 per cent; is that correct? Is that what you are testifying to now?

A Well, we knew what the consequences were as shown by the historical pro forma of getting 51 per cent or 60 per cent and not 80, and these were--what I would call

adverse consequences, and these were discussed and I believe they were confident that if they obtained the 51 per cent they could go on to get the balance within a reasonable period.

Q The balance up to 80 per cent?

A Yes, up to 80 per cent.

Q Was there any discussion with those gentlemen as to what would happen in the event they couldn't reach the 80 per cent figure?

A No, I don't recall a specific--I don't recall that.

Q When Greyhound came into the picture as a competing influence for Armour stock, did you discuss that question with these gentlemen at that time?

A Yes.

Q What was said at that time?

A The belief that they would negotiate with Greyhound to obtain the shares that Greyhound had obtained.

Q That they would negotiate with Greyhound to purchase Greyhound's stock?

A Yes.

Q Did you discuss with them what would happen if they couldn't do that?

A Well, I recall them saying that Greyhound was

in an untenable position--and this was at the time that Greyhound had 33 per cent--because it was paying 8 per cent for its borrowings and only getting a yield of about 1.5 per cent.

On the other hand, General Host's position at 55 or 57 per cent also seemed to me to be an untenable position and I just naturally assumed that one or the other would put these two blocks together and come up with 90 per cent.

Q Did you give any consideration in your discussions with them at that time as to what might happen in the event they couldn't agree on either General Host selling to Greyhound or Greyhound selling to General Host?

MR. SULLIVAN: Would you define when "at that time" is?

Q When you had these discussions that you just testified to.

A No.

MR. SULLIVAN: If that is the question, then I would renew the objection made earlier by Mr. McAmis as to testimony during this later period of time.

THE COURT: I'm not clear as to what period of time the witness is testifying insofar as the last question is concerned.

MR. WEISS: The question was, I believe--

THE COURT: Put the question and then we can get an answer.

Q Did you have conversation concerning the Greyhound counter-tender with General Host personnel prior to February 14, 1969?

A Yes.

Q With whom?

A With Mr. Glynn and probably with Messrs. Kingsley and Fay.

Q When did these conversations take place?

A I would say there were almost--there were conversations from time to time during the period of the preparation of the prospectus and the closing date of the offer and I can't recall the specific dates.

Q If I told you that the Greyhound counter-tender was announced on January 27, 1969, would that help you in recalling when you discussed the Greyhound situation with these gentlemen prior to February 14, 1969?

A Then it would have been that period between--

Q You definitely recall discussing it during that period?

A Yes.

Q What was the discussion concerning the impact

of the Greyhound counter-tender that you had with these gentlemen in between January 27, 1969 and February 14, 1969?

A Well, initially I guess no one knew what the ultimate outcome would be, whether Greyhound would gain a majority or whether General Host would achieve its minimum of 51 per cent.

Q Did you discuss the impact of the Greyhound tender on the ability of General Host to get a 80 per cent ownership?

A Yes, I believe so.

Q With whom?

A I can't visualize a specific conversation, but I believe it was with Mr. Glynn or Day or Kingsley.

Q What was said in that conversation?

A They expressed the confidence that if they were successful in achieving the 51 per cent that they would be able to go on and get the balance.

Q The balance to 80 per cent?

A To 80 per cent.

Q Did they express what the reason for their confidence was, how they would go about doing it?

A Basically because it made business sense that it would not make sense for Greyhound to sit with a large

block, a large minority interest indefinitely.

Q In other words, they were hoping that the parties would get together and make a deal between themselves?

A That is correct.

Q But it wasn't on the basis of a legal ability that General Host might have in the achieving of that result absent Greyhound's consent?

A Once it was apparent that Greyhound had achieved over 30 per cent, yes.

Q Well, at the time they made the announcement, didn't they announce at that point that they already owned 18.5 per cent on January 27th; is that correct?

A I believe so. I don't recall.

THE COURT: Is that the correct figure, 18 per cent at the time they made the tender offer?

MR. WEISS: I am going to introduce an exhibit. This will be Plaintiff's Exhibit 61 and it is Greyhound Corporation's--excuse me a minute.

I would like to have a one-minute recess on this.

(Pause.)

THE COURT: We will take our mid-afternoon recess, the regular one now.

(Recess.)

t5pm mpal Bettauer-direct

MR. WEISS: Your Honor, I would like to introduce in evidence the Greyhound revised tender offer, dated January 31, 1969, which is Exhibit 61.

MR. SULLIVAN: No objection. Just so the record may be clear, does Mr. Weiss still maintain the same representation about 30 per cent as he maintained before?

MR. WEISS: I would like to adjust it in the following manner: While the proof is that the numbers were in excess of 20 per cent of the outstanding stock of Armour as of January 31, 1969, I hope to introduce other exhibits which will indicate that it was more than 20 per cent prior to that time.

MR. SULLIVAN: Then I move to strike the question and answer that was had prior to the recess.

THE COURT: Well, I won't pay any attention to something that has been disavowed.

MR. GOULD: All I will do is record that I have no objection to the Greyhound document.

(Plaintiff's Exhibit 61 was received in evidence.)

THE COURT: All right. Proceed.

Q Mr. Bettauer, if at the time you reviewed the prospectus General Host used in connection with its

exchange offer for Armour securities you knew that General Host wouldn't get operating control of Armour's board of directors for at least a period of one year, would you have considered the inclusion of a combined or consolidated statement of those two companies on a pro forma basis a material misstatement in the prospectus?

MR. ROSENTHAL: Objection.

MR. SULLIVAN: Objection.

MR. GOULD: Objection.

THE COURT: What's the ground of the objection?

MR. GOULD: The first ground is that it assumes a hypothetical within a hypothetical.

THE COURT: I think you ought to get facts and figures before you define what operating control is.

Q If you had known that General Host couldn't elect a majority of Armour's board of directors --

MR. GOULD: I am going to object.

THE COURT: That doesn't follow one bit. It is possible to get other shareholders to vote along. It is even possible to persuade another minority stockholder to join with somebody who has this block of stock. You ought to give the figures.

MR. GOULD: And one other contingency,

your Honor, that directors not elected would concur in the views of Host.

THE COURT: Yes, it might be in the company's interest to take action that you suggest should have been taken.

MR. WEISS: I withdraw the question.

THE COURT: Do you have any further questions of this witness.

MR. WEISS: No further questions, your Honor.

CROSS EXAMINATION

BY MR. SULLIVAN:

Q Mr. Bettauer, was the loss in 1969 and 1970 -- you said that you discussed with Day and Glynn, in the event that Host got only 51 per cent of ownership of Armour--disclosed in the prospectus?

A There was disclosed in the prospectus a pro forma historical period, not 1969 and 1970 as you stated in your question.

Q And where was that disclosed?

A In the pro forma statement of combined income.

Q And was that disclosed for both 51 per cent ownership and 60 per cent ownership of Armour by Host?

A There was a net loss, yes.

THE COURT: I don't mean to be technical. You are all discussing 51 per cent. Is that what the prospectus said: 51 per cent or more than 50 per cent?

MR. WEISS: It showed on a pro forma basis 51 per cent, 60 per cent, 80 per cent and 100 per cent.

MR. GOULD: If your Honor looks at page 14, it is set forth in linear form with the hypothetical on the top of the column, the last four columns on the right start with 51 per cent.

MR. SULLIVAN: Your Honor is correct that the offer was for more than 50 per cent.

THE COURT: All right. Proceed.

Q Now, when you testified at page 44 of your deposition, and you said that it was apparent that Host would be headed for a difficult time if it did not get 80 per cent ownership of Armour, could you tell us what you meant?

A Well -- well, if nothing else changed, it would be reporting on a net loss basis, and presumably it would have to either borrow funds or utilize some of its working capital or sell some of its mortgages in order to finance the continuing.

Q When you say that, are you saying that Host couldn't continue owning less than 80 per cent?

A No. I was not saying it couldn't continue.

Q Could Host have done so?

A Yes.

MR. WEISS: I object, your Honor.

THE COURT: I didn't hear the question. Say it again.

(Question read.)

THE COURT: I didn't hear the question and answer.

(Answer read.)

THE COURT: I will allow it.

Q How could it have done so. You mentioned two things: selling assets, you mentioned borrowing. Was there anything else?

A Well, it would have utilized some of its working capital. I believe it had about 9 million of working capital in its balance sheet.

Q Could it also --

A It could have cut into that somewhat. It could have borrowed on the basis of the Armour securities, which were a liquid asset, or it could have sold

properties such as its -- well, its subsidiaries.

Q Could it have issued new equity?

A I assume so, although I don't know if that would be feasible or not.

Q Now, you said you gave no opinion to Allen & Company or Allen, Inc. and Host. Did you give anything to them?

MR. WEISS: I object. He said he didn't give an opinion with respect to the pro forma statements. That was the question and that was the answer. He didn't say he gave no opinion.

THE COURT: Is that correct? Was it stated correctly by Mr. Weiss?

THE WITNESS: Yes.

Q What did you give them on behalf of Price, Waterhouse?

A We gave them what is known as a comfort letter.

Q And does a comfort letter give a negative assurance on behalf of Price, Waterhouse that you know of no reason why the financials cannot be used?

A That's right. And that's --

MR. WEISS: I object, your Honor, unless we identify which financials he's talking about.

MR.SULLIVAN: Let me strike the question and rephrase it.

Q Does the comfort letter mean on behalf of Price Waterhouse that Price, Waterhouse has discovered nothing in the course of any postaudit work that the financials would be changed?

MR. WEISS: Again, we aren't referring to any specific financials. If we could identify the financials that they were doing subsequent events review on --

THE COURT: Yes, I think so. This way it is pretty vague.

MR. SULLIVAN: I would like to show the witness Defendants' A-50 for identification.

Q Is that the letter Price, Waterhouse rendered under your direction?

A Yes.

MR. SULLIVAN: I offer it in evidence.

THE COURT: Any objection, Mr. Weiss?

MR. WEISS: I object to relevance, because, your Honor, this whole comfort letter only refers to the audited figures that Price, Waterhouse had previously rendered an opinion on, and that has nothing to do with the pro forma presentation. It has to do with

the certification as at December 30, 1967. The pro forma combined figures were 10-month interim, unaudited figures and Price, Waterhouse, according to Mr Bettauer, did not render any opinion in connection with those.

MR. SULLIVAN: In connection with that objection, may I ask one question on the voir dire?

Q What is the purpose of a comfort letter such as this?

A It's to give what we call negative assurance to the underwriters that nothing has come to our attention subsequent to our audit to indicate that the opinion on those financial statements is still not appropriate.

Q Would you have given such a letter if you had known of anything false or misleading in the prospectus?

A I don't believe that would have had anything to do with this letter.

MR. SULLIVAN: May I offer the document based on his answer to the prior question.

MR. GOULD: May I ask him a question, your Honor, please, in the nature of a voir dire on the offered exhibit?

VOIR DIRE EXAMINATION

BY MR. GOULD:

Q Mr. Bettauer, whenyou wrote this letter you knew of the existence of a registration statement, did you not, in connection with the acquisition, with the exchange offer on the Armour stock?

A Yes.

Q You had been working on it for some time, had you not?

A Yes.

Q You had actually taken some part in the preparation of the document. And when you referred on page 2 to the registration statement, including the related prospectus, you were referring to precisely the prospectus on that precise exchange offer, were you not?

A Yes.

Q And if you had known that there was a false statement in that, would you have issued this letter?

A Well, we would certainly not have issued our consent to use our opinion in the registration statement, but I don't --

Q You are anticipating my next question, sir. At this moment I am only confining --

THE COURT: The question was, would you have issued this letter if you knew there was a false statement in the registration statement?

A No. Not in this form.

Q Not in any form, isn't that right? You wouldn't have had anything more to do with the transaction if you had known there was a false statement in the registration statement, is that right?

MR. WEISS: Your Honor, I object. Mr. Bettauer is still the auditor for General Host, and I think you could characterize him as an adverse or hostile witness in that posture.

MR. GOULD: I hadn't intended it that way.

THE COURT: We are interested in his answer. A very direct question was put to a man identified with a firm of certified public accountants who, according to the statement, were independent auditors.

MR. WEISS: Independent public accountants.

THE COURT: The question was whether or not he would have issued that letter if he had known that there was a material false statement in a registration statement, and he seems to be hesitating. Let the record indicate that.

I will give him an opportunity to answer the question. Put the question to him again.

Q You have my question in mind, Mr. Bettauer. My question is, if you had known that there was a material false statement in the registration statement would you have issued the letter, Defendant's Exhibit A-50?

A No, we would not.

MR. GOULD: Thank you very much.

THE COURT: What is the purpose of a comfort letter?

THE WITNESS: To -- to -- it's issued only to the underwriters, not to the -- not to be used publicly, and to give negative assurance to the underwriters that we have learned nothing subsequent to our audit that would affect the financial statements.

MR. WEISS: Your Honor, again, we must get from this witness which financial statements he is talking about.

THE COURT: Well, I take it in due course we will get it.

MR. WEISS: I promise you.

CROSS EXAMINATION CONTINUED

BY MR. SULLIVAN:

Q Did you give anything else to General Host with respect to this prospectus?

A Yes. We gave our consent to use the opinion we had previously issued on the audited financial statements.

Q And what was the purpose of your consent?

A The purpose is to indicate that we agree that it is appropriate to use the opinion and those financial statements in this document.

Q Would you have given that consent if you had known of anything false or misleading about the prospectus?

A No, we would not.

THE COURT: What opinion are you referring to now, so we have this record clear.

MR. WEISS: Do you want a copy of the prospectus, Mr. Bettauer, to answer the judge's question?

THE WITNESS: Yes, please.

(Document handed to the witness.)

MR. SULLIVAN: Will you turn to page 35.

THE COURT: While the witness is looking

for that --

THE WITNESS: I have that page.

THE COURT: Just one moment, please. The defendant has offered A-50 in evidence.

MR. WEISS: Yes. I object to it, your Honor, because it doesn't render any opinion with respect to the pro forma combined statements, in the presentation of them. It only refers to the opinion rendered by Price, Waterhouse that Mr. Bettauer will now tell us about, what it is, hopefully.

THE COURT: All right.

(Defendants' Exhibit A-50 was received in evidence.)

xx MR. WEISS: I think the witness was about to answer, your Honor, as to in what statement he gave an opinion.

THE WITNESS: Yes, sir. On Exhibit A-18, on page II-VIII there appears the consent of indepdent accountants, which is our consent to the use of our opinion. That is the consent that I was referring to.

THE COURT: What is A-18?

MR. SULLIVAN: A-18 is the form S-1.

MR. WEISS: It is part of the S-1, your Honor.

MR. SULLIVAN: It's one of the agreed-on documents.

THE COURT: All right.

MR. WEISS: But the question I don't think was answered because your Honor wanted to know from this witness which financial statement Price, Waterhouse rendered an opinion on, and he still hasn't answered.

THE WITNESS: I asked which opinion he was referring to.

MR. SULLIVAN: I offer A-18 in evidence, your Honor.

THE WITNESS: I was referring, your Honor, to our opinion dated February 9, 1968, which relates to the three fiscal years ended December 30, 1967.

MR. SULLIVAN: I offer A-18 in evidence, your Honor. II-VIII --

MR. WEISS: I object to relevance and materiality, because he is talking about a statement almost a year old.

THE COURT: What is the relevance?

MR. SULLIVAN: I am talking about a statement dated --

THE COURT: The date of that opinion is

prior to February 14, 1969. That's true. But he is referring to matters that go back to 1967.

We will save time. If it isn't relevant I won't consider it.

MR. GOULD: May I call something to your Honor's attention. The opinion as to which consent is given is the opinion of independent accountants, required under the regulations, under S-X to be part of the prospectus, Exhibit No. 23.

THE COURT: Then it's in evidence now.

MR. GOULD: It is.

THE COURT: What are we discussing then?

MR. GOULD: I don't know. That's why I am interrupting. It has to be in. It's the last audited figures they had.

MR. SULLIVAN: What I am talking about is the consent on the bottom of that page, which is dated December 30, 1968. That's the same date that the preliminary prospectus was filed with the SEC.

THE COURT: Where is that in Exhibit 23?

MR. SULLIVAN: It's an internal document, your Honor. It doesn't go out in the prospectus.

MR. GOULD: Might I clarify it, your Honor?

THE COURT: Then it is included in another

exhibit. What exhibit number is it?

MR. GOULD: The text of their opinion is included in Exhibit 23, at the top of page 35. That is their opinion, dated February 9, 1968, with respect to the prior fiscal year of General Host. Because those were the last audited figures under the regulations that consent which has been referred to in the other document here was required as a matter of regulation.

Now, on December 30, 1968, in this document, which is A-18, they consented to the use of their prior opinion. A conformity with the regulations of the Securities and Exchange Commission, under regulation S-X, that's the way it has to be done. It is always done that way.

MR. WEISS: Your Honor, I stipulate to that, that they rendered a consent with respect to their prior issued opinion on February 8, 1968.

MR. GOULD: They gave their consent on December 30, 1968, Mr. Weiss.

MR. WEISS: To the conclusion of the February, 1968 opinion. I agree.

MR. GOULD: If I may add one more word to it. If it has any probative importance in this case,

the probative importance is that on December 30, 1968 they gave their consent to the use of their prior opinion with respect to the audited figures, and then in effect brought it up-to-date later on with the cold-comfort letter, and if they had known of anything wrong they wouldn't have done any of those things. That's the substance of what we have got from this man.

THE COURT: I haven't got the letter. Where is A-50?

MR. GOULD: It's absurd that we should wrangle about this because the sequence is as plain as anything. They issue an opinion on audited figures in February, 1968. They give their consent to the use of it on December 30, 1968, and then on January 30, 1969, in the comfort letter, they refer to their knowledge of affairs --

THE COURT: They say:

"Subject to this explanation and based upon the limited review described above, nothing has come to our attention which in our judgment would indicate that during the period of time December 30, 1967 to January 30, 1969 there has been any change in the capital stock or long-term indebtedness of the company" and so

forth "except as set forth or contemplated in the above-mentioned registration statement."

MR. GOULD: Correct. And that's your whole panorama of auditor's imprimatur on things like this, and we will all stipulate that that's the way it is done.

THE COURT: All right. Proceed, please.

MR. SULLIVAN: I believe you haven't ruled on the offer with respect to the cold-comfort letter.

MR. WEISS: He has accepted it.

MR. SULLIVAN: It is in evidence now?

T5E pm
Gen Host
4-14-75

MP Bettauer - cross

Q Did you know prior to February 14, 1969, any reason why Host could not use consolidated financials in its prospectus?

A No.

Q Has Price, Waterhouse been the auditor for Host ever since the exchange offer?

A Yes.

Q Have you been in charge of that audit?

A Through the 1973 examination.

Q Do you know if there are any facts today which, had you known them prior to the offer or during the offer would have led you to believe that Host could not have used consolidated statements in the prospectus?

A Any facts which would have been available at that time?

Q Had you known them then.

A I would like to hear that question reworded.

(Question read.)

A No.

Q Do you know of any facts today which, had you known them in 1969, prior or during the exchange offer, would have led you to refuse to give or withdraw your consent?

A No, and that's based on information available at that time. It could possibly have been available.

MP 2 Bettauer - cross

MR. WEISS: Your Honor, the question is --

THE COURT: The answer of the witness is stricken as not responsive to the question. You may put the question again.

MR. SULLIVAN: Could we --

THE COURT: Have you forgotten it already?

MR. SULLIVAN: I will put it again.

Q Mr. Bettauer, do you know of any facts today which existed in 1969, prior to or during the exchange offer which, had you known them, would have caused you not to give or to withdraw the consent that you rendered on April 30, 1968?

A No.

THE COURT: Wait. There are other defendants, Mr. Weiss.

MR. WEISS: I am sorry. I acknowledge that Mr. Gould is a defendant.

THE COURT: He is not a defendant.

MR. WEISS: He represents a defendant. He is not a defendant yet.

BY MR. GOULD:

Q Now, Mr. Bettauer, when you -- you participated in the preparation of this prospectus, didn't you? You know what I am talking about. I am talking about Number 23.

Excuse me. I am wrong. You participated in the

financials which went into the prospectus, didn't you? Didn't you have something to do with that?

A Yes; we gave an opinion on those financials.

Q You reviewed them. They were discussed with you, were they not?

A Yes.

Q And when they came around to that schedule there, the one on page 14 -- have yougot it in front of you, sir? The pro forma combined statements of income in the prospectus, sir?

A Yes.

Q You've got it. Now, did you have anything to do with the preparation of that document, that part of the document?

A No, sir.

Q Did you see it?

A Yes.

Q Weren't you consulted with respect to whether or not that conformed in any way with an Accounting Research Bulletin?

A Not that I recall.

Q Well, let me see if I can refresh your recollection. You are familiar, are you not, with an Accounting Research Bulletin No. 51? I think you referred to it on your direct testimony.

A Yes, sir.

Q And that is an Accounting Research Bulletin which delineates, does it not, the purpose of consolidated statements? That is its purpose; you know that?

A Yes.

Q You have read it, haven't you?

A Yes.

Q And it also describes the consolidation procedure generally, does it not?

A Yes.

Q And, generally speaking, it is a guide as to what the auditors should do when they are dealing with -- let's call it a combination, financial combination of a parent and -- I'll call it loosely a subsidiary. Isn't that what it's supposed to do?

A Yes.

Q How you should set them up?

A Yes, sir.

Q And it also takes into account, does it not, what the percentage of ownership is; isn't that right?

A Yes, sir.

Q As between parent and the subsidiary? And for the purpose of this case, applying Accounting Research Bulletin No. 51, you were treating General Host as a parent corporation,

MP 5 Bettauer - cross

were you not?

A When you say "you" --

Q I mean Price, Waterhouse.

A We did not prepare this statement.

Q No, sir, but you read this statement?

A Yes, sir.

Q And you knew, did you not, when you saw this statement, that it had been prepared in accordance with the principles enunciated in the Accounting Research Bulletin No. 51? Didn't you recognize that?

A We read it, and we saw no violation of the --

Q That's right.

THE COURT: No violation of what? Let the witness finish the answer, please.

MR. GOULD: I was going to give the answer, your Honor.

Q You saw no violation, and his Honor asked you, no violation of what?

A Of a principle of consolidation.

Q That's right. You saw no violation of the principles which are enunciated in Accounting Research Bulletin 51; isn't that correct?

THE COURT: Again you are hesitating, Mr. Witness. Do you understand the question put to you?

THE WITNESS: I understand the question, your HONOR. We did not make an audit of this.

THE COURT: I understood you to say that, but I also understand you to say that you examined it and saw it.

THE WITNESS: We read it, yes.

THE COURT: Did you read it or did you study it?

THE WITNESS: I would say we read it. We did not study it as we would an audited --

Q His Honor is not suggesting to you that these are audited figures in any sense. Listen to my questions very carefully.

You saw this schedule, did you not, the one that appears on 14, before it went out to the stockholders of Armour?

A Yes, sir.

Q You discussed that schedule, did you not, with certain executives of General Host, you or somebody else in Price, Waterhouse?

A It would have been a very brief discussion, but --

Q But there was a discussion, wasn't there?

A I don't recall a specific discussion, but it's possible.

Q Well, is it possible that there was no discussion of the schedule?

A Yes.

Q You mean you just saw it, and you never reacted to anybody about it?

A I don't recall any specific discussion of it.

Q At any rate, you do remember seeing it?

A Oh, yes.

Q But you don't remember ever telling anybody that you had any comments on it; is that correct?

A That's correct.

Q And you did know that it was going out to the stockholders of Armour, did you not?

A Yes.

Q And you did know that it was going out in a document which had the name of Price, Waterhouse on it?

A That's right.

Q And you knew, did you not, that it conformed with your understanding of the requirements of Accounting Research Bulletin No. 15 with respect to pro forma combined statements of income consolidation practices; isn't that right?

A I had no reason to believe that it did not conform.

Q You were satisfied that it did?

A That would be overstating it, yes.

Q You saw no objection to it? Let's put it that way.

A Yes.

Q And you expressed no objection to it.

A That's right.

MR. GOULD: That's all.

THE COURT: Does any other defendant desire to question the witness before plaintiff goes into redirect?

MR. ROSENTHAL: I have no questions, your Honor.

MR. DUFF: I have no questions.

THE COURT: All right, Mr. Weiss.

REDIRECT EXAMINATION

BY MR. WEISS:

Q Mr. Could stated to you that your name went out on the prospectus associated with General Host in connection with the exchange offer; is that right -- Price, Waterhouse's name?

A Yes.

Q And you knew that? You know that?

A Yes.

Q Now, what is Price, Waterhouse?

A It's a firm of Certified Public Accountants.

Q A national firm; is that correct?

A Yes, sir.

Q And when an opinion or a consent is rendered to a client, it is rendered by the firm; is that correct?

A Yes, sir.

Q By Price, Waterhouse?

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q It is not rendered by the Chicago office or the New York office or the Cleveland office. It is rendered by the firm?

A That's correct.

MR. GOULD: I am going to object to that, your Honor. Obviously it's got to be rendered by somebody. Somebody has to issue it.

THE COURT: Go ahead.

Q Now, at the time that you rendered that opinion or that consent, that you gave the cold comfort letter to the underwriters, you were then aware, were you not, that Mr. Zick, who was also a partner of Price, Waterhouse, had testified that in his opinion there were certain material false and misleading statements and omissions inthis prospectus; is that right?

MR. GOULD: I object to that.

THE COURT: Sustained.

Q Did you intend the opinion of Price, Waterhouse to include Mr. Zick's opinions?

MR. ROSENTHAL: Objection.

MP 10 Bettauer - redirect

MR. GOULD: Oh, let him answer it.

THE COURT: You may answer.

A No.

Q How was it determined on what basis an opinion would be rendered in view of the fact that two partners of the same firm had conflicting opinions with respect to the propriety of the prospectus?

MR. GOULD: I object to that question.

THE COURT: There is no evidence that they had conflicting opinions.

THE COURT: Objection sustained.

MR. WEISS: I asked the witness whether he knew that Mr. Zick had a conflicting opinion.

THE COURT: You are not going to be able to prove it through this witness.

MR. WEISS: Except that it is this witness' firm.

THE COURT: Objection sustained.

Q Now, Mr. Bettauer, you testified that the pro forma statement on page 14 showed a loss; is that correct?

A Under the assumption of 51 per cent and 60 per cent ownership; that is correct.

Q Now, that's not a cash flow figure. That is an income figure; is that correct?

A That's correct.

MP 11 Bettauer - redirect

Q Profit and loss figure?

A Yes, sir.

Q Now, on an operating basis, does that pro forma combined statement show a loss?

A On the basis of the figure, income before extraordinary items, it does not show a loss. I don't know that I would characterize that as an operating --

Q In any event, before extraordinary items, it does not show a loss; is that correct?

A Yes.

Q And does that indicate that the company, through its normal operations makes a profit other than by virtue of extraordinary items?

A That's correct.

Q So that when a reader of this pro forma combined statement looks at it, he would see that the company, on a pro forma combined basis, has a positive cash flow as a result of its results of operations other than extraordinary items?

MR. GOULD: I object to the question.

THE COURT: It speaks for itself, doesn't it?

MR. GOULD: Yes.

THE COURT: I will let the witness answer.

A It doesn't necessarily demonstrate what the cash

flow would be, but it does show a profit.

Q It doesn't necessarily demonstrate what the cash flow will be?

A That's correct.

Q There is nothing in that statement that demonstrates what the cash flow will be; is that correct?

A I would like to look -- I would have to look at the notes before I answer that.

Q Surely.

A Well, it would be necessary to know the depreciation and one or two other items in order to calculate a cash flow statement.

Q And you don't have those figures?

A They don't appear on the face of this statement.

Q So there is nothing in this statement, in your opinion, that would be helpful to a reader in determining what the company's cash flow is, either on an historical or a prospective basis?

MR. GOULD: I will object to this, your Honor, if he means by "this statement" all of the financials. If he means just that schedule, that's something else.

THE COURT: You may recross-examine the witness on that point.

MR. GOULD: But shouldn't he be required to indicate

what --

THE COURT: It would save time if you would ask the question of the witness when Mr. Weiss is finished with his redirect.

MR. GOULD: Very well.

THE WITNESS: May I have that again, please.

(Question read.)

A Well, there are a numberof things that would be helpful, but there isn't sufficient to do the entire -- to complete the cash flow.

Q Isn't it also true, Mr. Bettauer, that, more frequently than not, when an extraordinary loss is incurred by virtue of the sale of assets at a loss, that rather than having a negative effect on the company's cash flow, it could have a positive effect on the company's cash flow?

A That's correct.

Q And that is the more normal occurrence when assets are sold; is that correct?

MR. GOULD: I object to that.

THE COURT: Objection sustained.

Q Did you study the composition of the extraordinary loss that was included in this pro forma combined statement on page 14 of the prospectus?

A I reviewed it at the time, yes.

Q Could you tell me whether or not the extraordinary loss that was incurred that gives rise to a loss figure in the 51 per cent column had an adverse or a positive impact upon the cash flow?

A I would have to go back and look. I will do that.

(Pause.)

A (Continuing) I am not able to locate the Armour statement to October of '68 -- On moment. I have it.

Q A-23, perhaps?

A 5-F. I am looking for Note 1. Yes. Yes, there is a presumption that would have a positive cash flow.

Q You mean a positive effect on the cash flow?

A Yes.

Q As opposed to a negative?

A Yes.

MR. WEISS: Thank you. That is all.

MR. GOULD: May I have just one moment, your Honor? There is something I want --

MR. SULLIVAN: May I proceed, your Honor?

THE COURT: Yes.

RECROSS-EXAMINATION

BY MR. SULLIVAN:

Q Mr. Bettauer, let me ask you to reflect for a moment. Could a person who is interested determine from the confines

MP 15 Bettauer - recross

of the prospectus Host's cash flow at ownership levels of 51 per cent, 60 per cent, 80 per cent and 100 per cent?

A Yes, sir.

MR. SULLIVAN: No further questions.

THE COURT: Mr. Gould, do you have any questions?

MR. GOULD: Yes, your Honor.

BY MR. GOULD:

Q Mr. Bettauer, you said before, you read this prospectus schedule, this pro forma combined schedule which appeared on page 14.

A Yes, sir.

Q Did you review it?

A What --

Q Did you review the schedule? I mean, what appears on page 14 and the accompanying notes on page 15.

A I use these -- certain words to mean specific things in this connection. When I say "examine", it means for the purpose of an audit, for the purpose of expressing an opinion. "Review" would mean for the purpose of expressing a negative assurance. It would be something less than a full audit but a review made with some intensity for the purpose of giving less than a full assurance.

I use the word "read" to mean that I read it without a purpose in mind of expressing either a negative assurance

or an opinion, and in that case the correct word would be that I read it.

Q And you read it with a view --

MR. GOULD: I will withdraw that.

Q When you read it, you had in your mind some concern about the professional responsibility of your firm, did you not?

A Yes.

Q And you were satisfied that you were not exposing your firm to any undue professional responsibility?

A That's right.

Q And that's what you mean when you wrote the comfort letter, isn't it?

A That's correct.

MR. GOULD: Thank you. I have no further questions.

MR. SULLIVAN: Your Honor, I have one more question.

BY MR. SULLIVAN:

Q If that cash flow was determined from the prospectus would it have been shown to be negative at 51 per cent and 60 per cent of Armour?

A I don't know.

Q When you say "I don't know", is that because you would have to sit down and figure it out?

A I would have to sit down and figure it out.

MP 17 Bettauer - redirect

MR. SULLIVAN: Thank you.

MR. WEISS: Your Honor --

THE COURT: Now, this is limited strictly to the questions asked on recross.

MR. WEISS: That is all I intend to do.

REDIRECT EXAMINATION

BY MR. WEISS:

Q What mechanics would you have to go through to determine the figure that Mr. Sullivan requested by taking all of the financials in the prospectus?

A Oh, I would take the income statement and add back -- well, first take the net income and add back the charge to income which were non-cash items. For instance, the depreciation charged to income which does not involve the expenditure of cash, and I would add those items that resulted in cash but did not result in income -- for instance, the loss that you mentioned earlier on the sale of fixed assets.

Then I would look at the increase or decrease in fixed assets and the increase or decrease, comparing the opening and closing balance sheets in other items, and wind up with a cash flow.

Q That would be the basis of the existing company, without taking into effect the exchange offer and debt service?

A I would do that first with Armour and Host and then combine the two in the same way that we had combined the income statements.

Q And how long do you think it would take the average lay person to do it if he could figure out what to do?

MR. GOULD: Objection.

MR. SULLIVAN: Objection.

MR. ROSENTHAL: Objection.

THE COURT: Sustained.

MR. WEISS: Your Honor, I might want to recall this witness later on, because he testified on cross-examination to a position, to Mr. Sullivan's question, as to whether or not anything was discovered subsequent to February 14, 1969 that would cause him to question the propriety of the use of the combined statement.

There is a work paper from Price, Waterhouse's files where the question of the propriety of consolidating Armour and General Host appeared before February 14, 1969. If I could have him back on Thursday, if we are still around -- and I suspect we will be --

THE COURT: Well, if the case is still pending. If not, I am not going to keep it open for any witness.

MR. WEISS: Thank you.

THE COURT: If there are no other questions, the

MP 18(a)

witness is excused.

(Witness excused.)

THE COURT: We will take our adjournment until nine-thirty, and we will sit until one-fifteen. I have motions in the afternoon, and depending on the length of those motions, I will let you know whether or not to come back.

(Adjourned to April 15, 1975, at 9:30 a.m.)

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ALAN L. SPIELMAN

v. 73 CIV 573 EW

GENERAL HOST, et al

April 15, 1975
10:00 a.m.

oOo

(Trial resumed.)

THE COURT: Proceed, please.

MR. WEISS: We are going to read from the transcript of John Glynn, your Honor, commencing at page 5.

"Q Mr. Glynn, could you tell us what your occupation is, please?

"A I am employed as vice president of finance of General Host Corporation.

"Q How long have you held that position?

"A Since approximately May 1st of 1973.

"Q Do you hold any other position at present with Host?

"A No.

"Q What was your position at Host before May of 1973?

"A Comptroller.

"Q How long did you hold that position?

"A Since September of 1968, at which time I joined the company.

"Q So that between September of 1968 and May of 1973 you were comptroller of General Host?

"A Yes."

Page 32, your Honor.

Your Honor, there might be designations by the defendants in other portions. I frankly would prefer if they would read it in on their portion of the case if they still desire it because I really cut mine down substantially.

THE COURT: All right, unless it would appear desirable from the point of view of continuity.

MR. WEISS: If there is something to be read near the portion that I am reading, I will pause and ask.

"Q When you referred to officers in a decision-making capacity, could you tell me who those people were in the fall of 1968?

"A To the best of my knowledge, there were Mr. Ashton and Mr. Pistell.

"Q And that would be about it?

"A Yes."

Page 76, your Honor, starting at line 4.

"Q Would you please look at the black book again?

"A Yes?

"Q I would like to refer you to--would you look at the middle of the page, Mr. Glynn under the--

"A What page?

"Q Excuse me, page 135, under 'Fourth Phase.'

"A Yes.

"Q The paragraph states:

'The Fourth Phase of the strategy would be to increase General Host's position in Armour to a point of virtually absolute control--probably somewhere between 40 per cent and 51 per cent ownership interest.'

"Did you understand that to mean that the management of General Host had the impressions--the impression in November 1968 that if they acquired between 40 and 51 per cent of the ownership of Armour that General Host at that point would, for all practical purposes, control Armour?

"A Yes, with the exception of including November 1968.

"I have no knowledge of the company considering this question prior to sometime in early to mid-December.

"Q That is your first recollection of--

"A That is my first recollection of the question being discussed.

"Q Can you tell me what was discussed at the time the question came up?

"A My recollection is hazy, but there was a meeting attended by representatives of Kleiner, Bell and Allen & Company, and I recall this discussion where two investment bankers felt clearly that 40 per cent ownership in the company would result in absolute control of Armour & Company.

"Q And who were the bankers that said that?

"A They were representatives of Allen & Company and Kleiner, Bell. I don't recall who the individuals were.

"Q Who else was at that meeting?

"A I don't recall.

"Q But I gather that you were at the meeting?

"A Yes.

"Q Were there any other members of Hoyt's management at the meeting?

"A I said I don't recall who else was there.

"Q What else did you recall was said on the subject of obtaining control and the percentage that

was required?

"A I don't recall any other portion. The reason that it stuck in my head was that it was, being somewhat new at this sort of thing, it was sort of unique with me, with 40 per cent he would obtain absolute control of the company."

THE COURT: You said "stuck in my head."

MR. WEISS: "Stuck in my mind."

Going down to page 79, line 21.

"Q Well, could you tell me at the time the prospectus was filed, to the best of your recollection, what was your impression as to what was required in order for General Host to obtain control of Armour?"

That was objected to.

"Q What was your understanding, Mr. Glynn?

"A The best I can recall was that I accepted the view of the investment bankers whose opinion--whose business it was to know such matters, and that required a stock, the amount of stock which was sought that we would have control of the company.

"Q When was the first time that you received the contrary impression, namely, that if you acquired 40 per cent or for that matter the majority of the stock that you would not obtain actual control of Armour?"

Objection and objection.

I will go to page 81, line 5:

"A They did in fact obtain control at a point."

I will read the defendants' designation since it follows. It seems to be colloquy. Using the Judge's suggestion yesterd --

MR. GOULD: I don't want the colloquy.

MR. McAMIS: You can omit the colloquy as far as I'm concerned.

THE COURT: You all agree so early in the day. That is fine.

MR. WEISS: Turning to page 95--

THE COURT: There appears to be the balance of an answer at page 82.

MR. WEISS: All right.

THE COURT: I think the defendants would want that. I don't know.

MR. GOULD: Yes, your Honor.

MR. WEISS: Line 8, page 82.

"A Well, as Mr. McAmis stated, 40 per cent is really not relevant since 51 per cent was the minimum that was provided for in the tender offer.

"At no time did we ever come to the

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conclusion that we would not obtain control of Armour & Company. There was a period following the completion of the tender offer where the Armour management resisted taking control, but at all times we felt that we would ultimately obtain control of the company."

Page 95:

"Q Did you attend any meetings either in December 1968 or January 1969 at which the terms of the tender offer were discussed with any other members of management?

"A Any meetings in December 1968 or January 1969 in which the terms of the tender offer were discussed?

"Q Yes.

"A I remember one meeting which the investment bankers were at, I think it was sometime in mid-December, which they discussed the value of the warrants, the value of the bonds were discussed. That is the only one that I can recall specifically.

"Q What do you recall was discussed as a result of the evaluation?

"A I don't recall specifically what it was other than that the investment bankers were giving their views as to what the value, the probable value of bonds, given interest rates and warrants, given exercise price

would be so that a package of such value could be structured to result in a successful tender offer for the Armour stock."

B2 Do you want me to read in pages 96 and 97?

MR. GOULD: Read from line 13.

MR. WEISS: This is the defendants' designation.

"Q At this meeting that you referred to was there a discussion of the people present as to an offer to be made by General Host to Armour stockholders involving the issuance of a debenture by General Host and a warrant?

"A Yes.

"Q During the course of the meeting did any member there representing investment bankers or anybody else suggest what they thought the warrant and the debenture would be worth to an Armour stockholder?"

Objection, objection - colloquy. I don't see an answer to that.

MR. GOULD: Didn't get an answer. There is no answer.

MR. WEISS: I am just wondering why you wanted it read.

MR. GOULD: I didn't want that last one.

THE COURT: That is why depositions are always so long and why I always say that I like to have counsel do their homework and get evidence. In almost every case almost 35 per cent of the depositions are given up to colloquy between counsel.

MR. GOULD: The only reason we are having a problem now is because we are not reading everything that was designated, which is all right. I am not complaining about it, but I just want your Honor to understand.

MR. WEISS: I am willing to have some expert come in and measure the percentage of plaintiff's colloquy as opposed to our adversaries.

We will now turn to page 102.

At this point, I want to introduce in evidence the four-page document dated January 30, 1969, which is addressed to H. J. Ashton from T. T. Day. It is Plaintiff's Exhibit 24.

MR. McAMIS: No objection.

MR. GOULD: No objection.

MR. ROSENTHAL: No objection.

XXX (Plaintiff's Exhibit 24 received in evidence.)

MR. WEISS: I am at page 102.

"Q Did you prepare pro forma cash flows for General Host at the request of the management?

"A Are you referring specifically to this exhibit you just had marked?

"Q Yes.

"A Inasmuch as the company memorandum is from Mr. Day to Mr. Ashton, I can't claim authorship of them. However, it is a reasonable assumption that I was aware of their content and probably was involved in their preparation.

"Q Who else would have worked on it besides yourself?

"A Mr. Day and members of my accounting department.

"Q Could you tell me what consideration you gave in preparing these cash flows as to the possibility that General Host would not acquire effective control or control the board of directors of Armour within a year after the 51 per cent of the stock was acquired?"

Page 104.

"A There was no consideration given to it because no consideration was necessary.

"Q Could you explain what you mean when you say 'no consideration was necessary'?

"A Because at all levels of ownership given the assumptions upon which these were prepared, which were

set forth in the schedule attached to the statement, there was no assumption used which would have had any--would have changed regardless of whether or not control was obtained--was or was not obtained.

"Q Are you saying, then, other than the assumption of 100 per cent ownership that whatever figures are set forth on these pro forma cash flows reflected use and expenses that were generated by the General Host Corporation?

"A That is correct, with one exception: At the 80 per cent level it reflects the utilization of--or the consolidation for tax purposes of Armour with General Host, 80 per cent being the required level before you may consolidate a company's earnings with your own for tax purposes.

"Q Now, did you prepare the pro forma statements that appeared in the prospectus which is Plaintiff's Exhibit 1 for identification? I'm referring particularly to the pro forma statements on pages 14 and 15, 17.

"A They were prepared under my supervision.

"Q Did you consider it appropriate to prepare pro forma statements for General Host and Armour and that such statements were in accordance with accounting rules?

"A Yes.

"Q Are you familiar with ARB 51, Mr. Glynn?

"A Yes."

MR. WEISS: We may as well put in an ARB 51, Exhibit 1.

MR. McAMIS: No objection.

XXX (Plaintiff's Exhibit 1 received in evidence.)

MR. WEISS: We are at the bottom of page 105.

"Q Would you please look at the bulletin? I refer you more particularly to paragraph 2, the second sentence states, 'After talking of consolidation, however, there are exceptions to this general rule. For example, a subsidiary should not be consolidated where control is likely to be temporary, or where it does not rest with the majority owners, as, for instance, where the subsidiary is in legal reorganization or in bankruptcy.'

"Will you please tell me whether you tock into consideration ARB 51 before you made the decision to includ pro forma statements in the prospectus?

"A Of course.

"Q What is your understanding of the sentence that I just read to you?

"A My understanding of the sentence is that--there are two instances referred to here where a subsidiary

should not be consolidated: One where control is likely to be temporary, and that has generally been construed by the accounting profession to mean where a subsidiary is held with the definitive intent of management to dispose of it in the immediate future.

"The second part of it is where the control does not rest with the majority owners as, for instance, where a subsidiary is in legal reorganization or the bankruptcy. It speaks for itself.

"Q Right. It says as for instance where the subsidiary is in legal reorganization or in bankruptcy. Did you consider whether control was with General Host in view of the fact that it did not control the board of directors of Armour?

"A At the time the pro forma financial statements were prepared in December of 1968, obviously we did not control the board of Armour. These pro forma statements were prepared at that time to give effect to the proposed tender offer.

"The assumption was that, upon obtaining 51 or more per cent of the stock, that General Host would ultimately control Armour and the company's board.

"Q When you say ultimately control the board of directors of Armour, did you give any consideration as

to when this control would take place? The passage of control?

"A The assumption was at the first annual meeting which was to be held, I believe, in late February of 1969.

"Q Well, do you recall having discussed with anybody as to whether it was reasonable to assume that at that February 1970 meeting that General Host would be able to place a majority of their nominees as members of the board of directors?

"A No, not effectively.

"As I told you earlier, we had discussions in December at which time our investment bankers advised us that in their opinion that even 40 per cent ownership of Armour, much less 51 per cent or more, or ultimately 57 per cent as it subsequently proved to be, was sufficient equity ownership to control the company.

B3 "Q When you say 'was sufficient equity ownership to control the company' do I understand that it was your understanding that these meetings with the bankers, that by having 40 per cent control that you would be able within a short time thereafter to obtain control of the board of directors of Armour?

"A That was my understanding.

"Q Was there any discussion at your meeting with the investment bankers as to how long a period of time this turnover of control would take?

"A I don't recall any such discussion.

"Q Do you recall any discussion that took place at the time you prepared or caused to be prepared these pro forma statements with anybody else as to the question of whether it would be appropriate to include the pro forma statements?

"A Maybe I better clarify one thing. It was not a question of whether or not it would be appropriate to include them in the prospectus. There was no alternative to that.

"The SEC has for many years made it an absolute requirement that where you are making an exchange offer of this type or in any other business combination transactions, that pro forma statements be provided giving effect to the proposed transaction, and that the assumptions upon which the statements are prepared be set forth clearly.

"So it wasn't a matter of whether or not we wanted to or considered whether they should be included in there. There was no alternative to inclusion of them.

"Q Is it your testimony --

"A However, to get to your point, it was our understanding and assumption that control of Armour & Company passed to General Host Corporation upon obtaining fifty-one percent or more of the common stock of Armour."

This is defendants' request:

"Q Now, when you say 'control would pass,' is it fair to say that included within that statement 'control would pass' that control of the Board of Directors of Armour would pass?

"A My understanding of control did not run to the numerical count of directors but to the ability to influence the company's actions and affairs.

"Q Could you explain that a little more when you say 'the ability to influence'?

"How would you be able to influence them if you didn't have control of the Board?"

Page 112.

"The Witness: I will be happy to try to answer it.

"A There have been many instances that I am aware of where companies were, in some cases were as little as ten percent, twelve percent of a company's stock and even less, and without having a majority of its

mpa2 "Glynn

representatives on the Board of Directors of the company, has still controlled that company's activities.

"Q Can you give me -- I am sorry, I thought you were through.

"A And so my understanding again of control was the ability to influence the company's actions and activities, and it was not my understanding that you needed an absolute mathematical majority of the Board of Directors in order to be able to do that.

"Q Can you tell me from whom you received this understanding as to the ability to influence the actions of the other company?

"A Which understanding do you mean?"

I don't think there is an answer to the next question.

MR. GOULD: I think if you go to the bottom of 115 you can pick up the one that I am interested in.

"Q Did you consider this understanding as an antagonistic attitude taken by the Armour management in reaching a conclusion that General Host would be able to" --

THE COURT: I think, really, if you started at the top of the page there, it would be a better se-

mpa3 "Glynn

"Q What I was asking you, Mr. Glynn, is not your understanding but the way in which you came to that understanding.

"Did you have any discussions with any of the other members of the General Host management?

"A I don't have any recollection of specific discussions. It just was my understanding that with that stock ownership that we could control Armour & Company.

"Q Now, you had testified previously that you and the other members of the General Host management by early December of 1968 were aware of the fact that the Armour management was opposed to any involvement by General Host in Armour affairs; is that a fair statement?

"A That was my understanding, yes.

"Q Did you consider this understanding as an antagonistic attitude taken by the Armour management in reaching a conclusion that General Host would be able to influence the actions of the Armour management even though General Host did not control the Board of Directors?

"A Yes. The assumption was that when you are in possession of seventeen percent of the stock

mpa4 "Glynn

of a company, the Board of Directors of that company is likely to act in significantly different fashion than when you are the owner of fifty-one percent or more of the stock of the company.

"Q What did you base this thinking on that there would be a difference in the way the Armour board reacted?

"A I don't -- I can't really recall the specific thought process, but part of it I am sure was based on the statements of investment bankers, that even a forty percent interest would give us control.

"Part of it I am sure was also based on the fact that in that period of time in the business community there were many, many of these what we term unfriendly tenders taking place, and they generally followed a pattern of the management of the target company, if you will, being hostile initially to the first overtures, and then once the tender offer which the acquiring company would acquire a majority of the stock, there was, invariably, an accommodation reach which is a logic course of events.

"Q Do you remember whether in any of these other tender offers the situation existed where there was a staggered Board of Directors to be elected over

mpa5 "Glynn

three years and cumulative voting existed?

"A I don't recall.

"Q Do you recall -- you had mentioned previously about your experience with the Security and Exchange Commission on this point and that you had no alternative but to prepare pro forma statements.

"I gather then -- did you discuss this question with the S.E.C. of the necessity of a pro forma statement in connection with this prospectus?

"A I will try to answer your question.

"It was clear based on everything we knew that these statements would be required. They were provided in the prospectus that was filed with the S.E.C., the S.E.C. reviewed it and requested certain minor revisions to the pro forma statements, and it was finally declared effective.

"So, in effect, certainly the S.E.C. was, by implication, if nothing else, indicating that such statements were required.

"It was the sort of thing that -- I don't recall if it was inthe regulations or the form S-1, but it is something that has developed over the years as a matter of -- what would you call it? Practice or custom that these type of statements are required."

mpa6 "Glynn

I will skip to page 119:

"Q Was the possibility that upon acquiring fifty-one percent of the stock of Armour, General Host would still not be in control of the majority of the Board of Directors of Armour, was that possibility explored with the Securities and Exchange Commission?

"A No."

Go to page 124.

MR. MC AMIS: Would you read just the next question and answer.

MR. WEISS: ""Q Do you remember discussing this matter with any representatives of Price Waterhouse?

"A No."

Page --

MR. GOULD: You have our designation, Mr. Weiss, at the bottom of 121.

MR. WEISS: "Q - Did you mention, I think you did, before. that your experience with the S.E.C. was such that you were satisfied that pro forma statements here would have been required by them?

"A Absolutely."

THE COURT: Mr. Weiss, may I interrupt? What was your position, that that should not have been in-

mpa7 "Glynn

cluded in the prospectus?

MR. WEISS: My position is this: that taken together with the language on page 9 and in other portions around that area of the prospectus, immediately followed by these pro forma combined statements, there is an illusion created of the ability to get control right away and to put these companies together.

Now, if there was sufficient precautionary language above the presentation that we might not be able to merge these companies --

THE COURT: In other words, you are saying that there was the thought that it might take two years to displace the current board of directors, assuming that the board of directors was hostile to General Host?

MR. WEISS: Not only that, but under Delaware law they couldn't merge without a two-third vote of the board of directors.

MR. GOULD: I think there's a little danger if we equate the term "control" with "numerical control."

THE COURT: Mr. Gould, you may make the observation. My question was directed to Mr. Weiss. I was simply inquiring as to what his position was with

mpa8 "Glynn-

respect to the pro forma statements, whether they should have been excluded, because that appears to be the thrust of his questioning.

Why were they included?

MR. WEISS: We have a technical argument also.

THE COURT: Well, the answer so far has been that either by rule or custom of practice, the SEC does require the inclusion. That's the testimony of the witness, as I understand it, and also the testimony of the witness yesterday.

All right. Put your next question.

MR. WEISS: Page 122. I am trying to weed out as much as I can, your Honor, as I am going along, trying to edit.

All right, page 141:

"Q Do you have a copy of the prospectus with you?

"A Yes.

Q Could you look at page nine, please?

"A Yes.

"Q I refer you to the last three paragraphs which state, the first paragraph states:

"'General Host intends to act promptly both

mpa9 "Glynn

before and after consummation of the exchange offer to obtain control of the Board of Directors and management of Armour. In this connection it may engage in the solicitationof proxies for the election of Armour and other matters, both at the February 21st, 1969 annual meeting of Armour and Company and otherwise.'

"Could you tell me what your understanding of the words Aand otherwise' was at teh time the prospectus was filed?

"A I have no knowledge of what 'otherwise' meant either at that time or now.

"Q Did you believe that as a result of the solicitation of proxies or otherwise, that General Host would obtain control of the Board of Directors and management of Armour in February 1969?

"A Yes.

"Q Could you address yourself to the next paragraph, please.

"'General Host may find it desirable upon consummation of the Exchange Offer to propose to stockholders of the relevant corporations a merger or consolidation of it or its present or future subsidiaries with Armour or certain of its subsidiaries, or General Host may find it desirable to dispose of portions of

mpa10 "Glynn

the assets presently held by it or by Armour. If no such merger or consolidation occurs, and if General Host has not acquired more than 80% of Armour's common stock, which would allow it to enter into tax-saving arrangements, General Host may find it necessary or desirable to increase the dividend paid on common stock by Armour, or to incur new indebtedness or issue additional equity securities.'

"Now, could you tell me whether it was your understanding that in order for General Host to dispose of portions of assets held by Armour, that General Host would control the Board of Directors of Armour."

Now we have to go through three or four pages of colloquy to the answer.

Go to page 146:

"Mr. McAmis: Did you read the language to which Mr. Feuerstein has referred in January 1969?

"The Witness: To the best of my recollection, yes.

"Mr. McAmis: Did you have any understanding at that time as to what would be required in order to dispose of portions of the assets held by Armour?

"The Witness: Control of Armour & Com-

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pany."

All right, now go to 148, line 12:

"Q Similarly, would you please look at the last sentence of that paragraph and tell me whether you believed that General Host would control the Board of Directors if it were going to incur new indebtedness or increase the dividend paid on common stock by Armour or issue additional equity securities?

"A There is a presumption of control in all of these statements there."

Now go to page 175.

MR. GOULD: Could we have a moment?

Go ahead, Mr. Weiss.

MR. WEISS: All right.

At 175:

"Q Mr. Glynn, were you asked to participate in the preparation of a report in either March or April of 1969 that would deal with the cash requirements from General Host taking into account the fact that General Host elected only twi directors of the Board of Directors of Armour at the 1969 annual meeting and did not have the majority of the board as their representatives?"

I think we will skip past that. Go to page 177:

"Mr. McAmis: Did you prepare in March 1969 financial statements for General Host based on General Host's situation as it then existed?

"The Witness: Yes.

"Q What was the nature of these reports?"

MR. MC AMIS: Your Honor, I object to further questions along these lines as to the Host prospectus, based on my objection yesterday.

MR. WEISS: I think the question will be cleared up, your Honor, if you will await the end of this line of questioning.

THE COURT: All right. We will take it subject to connection.

MR. WEISS: "A We prepared regular normal recurring financial statements of accounting periods throughout the year. The nature of them were income statements, balance sheets.

"Q I have shown you this document entitled 'General Host Corporation Proposed Financing Plan.'

"Is it correct to say that you participated in the preparation of this plan?

"A Yes.

"Q Now, could you tell me what the purpose of this report was, Mr. Glynn?

mpal3 "Glynn

"A My best recollection is that it was to be used in obtaining additional financing for General Host Corporation sometime in 1969, sometime prior to the fall of 1969 when it was necessary to repay 9.4 million dollars of debt to the insurance companies."

I believe that that's the end of the Glynn transcript, your Honor.

THE COURT: Do defense counsel desire to read any portion of the Glynn deposition that hasn't been read?

MR. MC AMIS: I think perhaps so, your Honor.

MR. GOULD: I have one thing. Could I read it in?

Page 87, line 14:

"Q At what point was the decision made to proceed with a tender offer?

"A I can't tell you exactly, but it was subsequent to the Williams Bros. merger proposal, and to the best of my recollection it was to a significant extent as a result of that merger proposal.

"I recall that there was a feeling in the management of General Host that the Armour management was prepared to do anything regardless of whether

mpal4 "Glynn

or not it was detrimental to the interest of all Armour shareholders to dilute the General Host stock position in the company."

And then on page 88, line 16:

"Q But it would have been after your report on the Williams Company?

"A My recollection is that the proposed merger with Williams Bros. Company was the predominant reason why General Host management decided that it had to increase its investment in order to protect its current investment at that time, yes."

MR. WEISS: I think we should also read --

MR. GOULD: I'm not through yet.

Page 149, line 9, your Honor. The question was put to Glynn:

"Q [illegible] get more specific, Mr. Glynn, whether if the cash flow statements were adequate to take care of the needs of General Host, why it would be necessary to increase the dividend."

Then there's a long colloquy among these embattled lawyers, and the answer appears on page 152:

"A My reason for this language was in a sense precautionary; that nobody could predict with complete accuracy what would happen down the road, and it was my

understanding, and I was not in any way involved in the development of this language, my understanding was that it was in there so that in the event unforeseen circumstances required us to do any one of those things, we at least had advised the investing public beforehand that it was a possibility.

"Q What was your understanding based on? Did anybody discuss this with you?

"A No. Frankly, I don't recall whether it was just my own reading of it or whether it was based on hearsay or whether it was based on sitting in on a meeting where it was discussed, I really don't recall. It could have been any one of those."

MR. MC AMIS: Your Honor, I would like to read or ask Mr. Weiss to read, whichever he prefers, a portin of his designation that appears on page 155, beginning at line 9.

MR. WEISS: I don't mind if you exercise your voice a little.

MR. MC AMIS: "Q Can you tell me briefly what the substance of that involved, the different positions?

"A Very simple. The attorneys for Armour and Company maintained that by use of the pro forma

financial statements i. the prospectus which was based on 1968 historical figures, that that was the only appropriate means of determining whether or ..ot there would be sufficient cash flow available to General Host Corporation in 1969 and subsequent years to pay the debt service and the seven percent debentures.

"The company's position was that it would be totally erroneous to do that and that tjey must use all of the information available to them as to what the actual or best estimate of cash available in the year 1969 and the year 1970 would be, and therefore we used our forecasted results for those years rather than the historical prior years' results as the basis for them.

"Q Did any of these projections appear in the prospectus?

"A No."

That is all I require.

MR. WEISS: Anything else?

MR. GOULD: I have nothing more.

T I M O T H Y T. D A Y, called as a witness by plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WEISS:

Q Mr. Day, I show you Plaintiff's Exhibit 24 marked in evidence and ask you whether you prepared that exhibit?

A Yes, I prepared the exhibit.

Q Now, this is the pro forma cash flow that was prepared on January 30, 1969. For what purpose was this prepared?

A This cash flow was probably prepared earlier than that. The work papers behind all of these cash flows and this document really was to put in really more polished -- a more polished document, what we believed our cash flow position would be.

Q For the two next years, is that correct?

A For 1969 and for 1970, we had at various assumed levels of success in the tender offer.

Q Now, in this exhibit on page 2 appears a pro forma cash flow, 1969, is that correct?

A That is correct.

Q Does this particular page of the exhibit

purport to reflect all of the cash-in and cash-out requirements for that year?

A Well, I think if you read the assumption, which is in Exhibit 3, I think you will note that the assumption was mas that the $9.4 million of insurance debt would be refinanced. There were certain assumptions that were set forth in this Exhibit 3.

Q Now, when you say it would have to be refinanced, does that mean that the existing lender would have to be paid back, that the debt would have to be paid to the existing lender?

A That is correct.

THE COURT: It could be extended too, couldn't it?

Q Wasn't there evidence at that time that the existing lender wouldn't extend?

A It was my understanding that if we were successful with a tender offer, that the group of insurance companies, Equitable -- I am not sure who else -- it was my understanding that the loan was to be paid off in August of 1969. I don't know whether there were discussions as to whether it could be extended, but the particular loan, which bore an interest rate of only 5-1/2 per cent, which was quite low at that point in

time, I believe, had to be paid off and we would pay that.

Q And isn't it also true that the particular $9.4 million loan was accelerated as a result of this exchange offer so that it became due in August of 1969?

A Well, I believe that is correct.

Q In other words, the original payment date was at a later date, later than August, 1969?

A In other words, the original debt repayment schedule of the original indenture did not call for repayment of 9.4 million in August of 1969, that we had agreed to repay to accelerate the repayment of that debt in August of 1969, it was my understanding in conjunction -- if the tender offer were successful.

Q Now, one of the assumptions, then, in your compilation of this pro forma cash flow is not an assumption of payment of this 9.4 million, is that correct?

A It's the assumption of refinancing of that $9.4 million.

Q In other words, a repayment and a borrowing from somebody else?

A A simultaneous repayment and borrowing, or refinancing.

Q In order to refinance you would have to go to a third party and borrow the money from sources outside of the corporation, is that correct?

MR. GOULD: I object to that.

Q Did you ~~delay~~ anticipate paying off that debt with internally generated funds?

A We didn't contemplate paying it off with internally generated funds.

Q Now, if that $9.4 million had been included as an obligation to be paid by General Host during 1969, what would have been the effect on the net cash flow available at the bottom of that pro forma?

MR. MC AMIS: I object, your Honor. That is a hypothetical, based on no state of facts that's in evidence. The evidence is that they intended to refinance the loan.

Q I assume that this schedule represents the fact of the knowledge that they had to pay off that debt. Is that what a cash flow statement is supposed to be?

THE COURT: Well, they intended to refinance it. Isn't it argumentative? I think the answer is obvious from the question you put. I think a lot of ifs change a lot of situations.

Q In any event,it wasn't included in that schedule as an obligation of the corporation for the next year?

THE COURT: The witness, after explaining the schedule attached to No. 3, explains the basis on which it was set out -- on Exhibit 3 attached to --

MR. WEISS: Exhibit 3.

Q Mr. Day, is there anything in the pro forma cash flow -- Exhibit 1, is it -- Exhibit 1 to Plaintiff's Exhibit 24, that covers the use of cash funds by General Host in 1969 for capital expenditures?

A There is not.

Q Was it contemplated that General Host would spend money for capital expdnditures in 1969?

A It was contemplated that we could -- we could defer, if we so -- fi it became so necessary in our mind, we could defer substantially all capital expenditures if that became necessary. It wasn't contemplated because we had positive cash flow, that we would necessarily eliminate all capital expenditures.

Q You read the prospectus at the time it was prepared, did you not?

A Yes, I did.

Q I read from page 22 --

THE COURT: I think I have a copy. Where are my exhibits?

(Pause.)

THE COURT: Gentlemen, please, when you offer these exhibits in evidence and I receiveda copy, I want the originals and not the copies returned to me. I have made notes on some of them.

23 was the prospectus, wasn't it?

MR. SULLIVAN: Yes, your Honor.

THE COURT: Well, let me have another copy.

Q Now, there's a section on page 22, Mr. Day, "Capital expenditure program," and it reads:

"In 1967 the company spent more than $8 million for expansion of capital facilities," and it describes what those facilities were.

Then it goes on:

"The company has continued its capital expenditures program during 1968, spending close to $6 million for substantially increasing" -- and then it goes on and tells what it was spent for.

"The company proposes to continue its capital expenditures program during 1968 using funds to be derived from retained earnings and accumulated de-

preciation. There can, however, be no assurance that this program will continue on schedule, because it depends in part on funds to be generated by operations."

Do you recall that?

A Yes, I do. May I read it?

(Pause.)

Q Now, was there any provision made for those capital expenditures in this cash flow?

A There weren't.

Q And how about on the next page, for 1970?

A There weren't.

Q Now, the profit before taxes, on the top of the 1969 pro forma cash flow of $5.493 million, is an estimate, is that correct?

A That is correct.

Q Is there any conclusion on this pro forma cash flow statement of an amount for the amortization of a renewal or a replacement of the $9.4 million financing?

A I don't follow your question.

Q Well, when you borrow funds, don't you normally have to amortize those borrowings by paying over a period of time?

A Repayment of the debt. No. There is not any -- there is not -- there is not any repayment of the long-term debt schedule in here, which I don't consider unusual. In many term loan situations there is no amortization for a period of three or four years, sometimes considerably longer.

Q But there are repayment schedules for the loans listed on the last page of this exhibit, aren't there?

A Yes, sir. Those were loans which were already on the books, which had an amortization schedule already built into their indenture.

Q But in any event there is not one for the 9.4 million?

A That is correct.

Q There is a statement on Exhibit 3, which is the third page of this exhibit, under the words "Tax Benefit."

"1969 Tax Benefit." The second sentence:

"At 80 per cent ownership the tax benefit is based on an assumed tax-sharing agreement by which Armour reimburses General Host for the use of 80 per cent of General Host's tax losses in the consolidated return."

Was it your understanding that in order to file a consolidated statement for tax purposes such as described therein that you would have to get the consent of Armour?

A I don't recall if that was my understanding.

Q Did you have any understanding on the subject?

A I'm sure I had an understanding at the time I prepared this.

Q Was it your understanding that you could just automatically consolidate these two companies for tax purposes without agreement between them?

A I don't recall specifically my understanding.

Q Mr. Day --

MR. WEISS: I would like to mark, your Honor, for identification -- this is an agreed-upon document, wasn't it?

MR. MC AMIS: Which is that?

MR. WEISS: Plaintiff's Exhibit 39. I would like to offer it in evidence.

(Plaintiff's Exhibit 39 was marked for identification.

MR. WEISS: I would like to put it in evidence. It is a stipulated document.

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MR. GOULD: I have no objection.

MR. McAMIS: I have an objection unless this witness is prepared to say that he is the author. Otherwise I don't see that it is relevant. He saw it and used it.

MR. WEISS: Very well.

Q Mr. Day, I show you Plaintiff's Exhibit 39 marked for identification which, unfortunately, is a small one.

Did you prepare this exhibit, Mr. Day?

A I don't really recollect this exhibit, quite frankly.

Q Do you see your initials up on the top, "T.T. Day"?

A No. Yes. Yes.

Q Did you work on an evaluation of the debentures and warrants in preparation for the exchange offer?

A Yes, I did.

Q Did you work with anybody from Allen & Company with respect to that?

A Yes, I did.

Q What functions did you perform with respect to those evaluations?

A Well, I relied basically on--my contact was

largely with a Mr. McDowell of Allen & Company. I don't know who to spell it. And we would review various debentures and various warrants, and I believe he had data for comparable issues, as best as he could pull together, of warrants and debentures and we tried to ascribe values for the various packages that we were exploring.

Q Did you ever personally prepare an interest coverage ratio for these debentures?

A I may well have. I don't specifically recall that, but I could easily have done that, as I could easily have prepared this. I don't really recall this schedule.

Q Would you look at this schedule and in particular the interest coverage S and P method column. Do you recall the 1.44 figure as a figure that was worked with by you at that time?

A I don't recall that. It could well be. I really don't recall that.

Q Do you remember what assumptions were used in compiling that 1.44 figure?

A If I don't recall the figure, I certainly don't recall what the assumptions would be.

Q How did you evaluate the debentures at that time?

MR. GOULD: Your Honor, would it be appropriate

if we had some kind of date, the date of preparation?

MR. WEISS: This is prior to the exchange offer.

THE COURT: That is your statement. That isn't evidence.

Q Did I ask you prior to the preparation of the exchange offer--is that what you thought I was asking?

A I thought you were talking about--yes, prior. I was thinking in terms of December in my mind. I guess I should have been more specific.

Q This is in December of 1968 that you were working on various potential values for the debentures and warrants; is that right?

A Yes, we did.

Q Did you come up with any figures?

A We--the investment advisers came up, Allen & Company came up with estimates on various packages as to what they thought they might sell at. There was, of course, no way of knowing until they were actually in the market place or actually traded in the market place what values the market will ascribe to them, but they gave us, rendered opinions, verbal opinions as to what various packages might be worth.

Q Did you come up with any of your own evaluations

for the debentures?

A Are you talking in December or are you talking prior to--

Q Let's talk about December 1968.

A You are talking about December 1968. I'm sure that I ended up with--my own personal opinions after listening to the representatives from Allen & Company and Kleiner, Bell.

Q Do you recall what range, if any, you concluded the bonds might trade at?

A When you say range, I don't--

Q A range of discount.

A A range of discount.

MR. McAMIS: Does he mean Mr. Day personally?

MR. WEISS: Yes.

A Did I personally come to a conclusion?

Q Yes.

A I thought it was possible, maybe even probable that they would trade at some level of discount. I don't recall what exactly that was.

Q Just a possibility?

A I said possibility or probability that they might trade at discount.

Q Did you think it was a probability or

possibility?

MR. GOULD: I am going to object to this.

THE COURT: You are being quite argumentative now.

Q Did you compute what the highest possible discount might be in your own mind?

MR. GOULD: I object to that.

THE COURT: Is he an expert in this area? You haven't qualified him as an expert at all.

Q Was a discount figure employed in the prospectus, Mr. Day, do you recall?

A It is my recollection that there was a discount figure indicated in the pro forma statements.

Q How much was that discount?

A My recollection was about 17 per cent, but I don't--well, it is page 18 on Footnote D. I see--I'm not sure if this is the only reference, but I see a reference on Footnote D to original issue discount.

Q Would you explain to the Court what that language means, Mr. Day?

MR. McAMIS: I object to further questioning on this point on the basis that this issue as to Host knowing that the bonds were traded at discount were made for the first time in plaintiff's statement of the issues

and for that reason I think it has come into the case too late.

MR. GOULD: I am going to object to the question which has been put because I don't know how anybody can explain better than it is explained what discount means.

THE COURT: I will let the witness explain it.

MR. GOULD: I doubt if he will do better.

THE COURT: You may amplify it.

A Well, the sentence says to me that we have recorded in the pro forma financial statements and assumed original issue discount of 17.65 per cent as well as amortization of that original issue discount for a full year, using the interest method, which is a standard accounting method for amortizing original issue discount, and that the warrants have been recorded at an assumed value equal to the original issue discount and so reflected on the pro forma balance sheet.

Q What does that mean in terms of what the debenture might trade at, if anything?

MR. GOULD: Objection, your Honor.

MR. McAMIS: Objection.

Q Does it mean anything?

MR. GOULD: That again I object to. How does he know?

Q What does that figure purport to mean? Tell me. I'm a lay person. I don't understand that technical language. What does it purport to mean?

MR. GOULD: You don't cure the defect with that question. I don't think this witness is competent to answer it.

THE COURT: I think it speaks for itself. I'll allow them to amplify it.

MR. WEISS: Did you say you would let the witness answer?

THE COURT: I did already.

Is there anything you want to add to your answer? What is your next question?

B2 Q Does that indicate that the company is carrying the value of those debentures at something less than $60 a bond?

A The assumpting for putting the pro formas together was, yes, they were carried at something less than $60 per bond. The actual original discount recorded could not be determined until the bonds actually traded and I don't believe it was 17, whatever, 17.65. In fact, I'm not sure what the original issue discount was actually recorded at.

Q Did these bonds trade when issued prior to

February 14, 1969?

THE COURT: What bonds are you referring to?

MR. WEISS: The bonds that were being offered to the Armour shareholders in the exchange offer.

THE COURT: I thought they were debentures.

MR. WEISS: I will use the word debentures.

THE COURT: Isn't there a difference? I always thought there was.

MR. WEISS: All right.

Q Were these debentures traded on a ~~one~~ issued basis, do you know?

A I frankly can't recollect whether they were traded on a one issue basis.

Q Do you know if these bonds traded at their face value at any time after they were issued?

MR. McAMIS: Objection, your Honor.

THE COURT: I will let him answer, but are you suggesting now that upon the issuance of these debentures that one has to know in advance what the market value is going to be and whether the market is going to discount it or even appreciate it?

MR. WEISS: I am suggesting, your Honor, that their own--

THE COURT: Don't go through this with this

witness. Obviously he hasn't been qualified. I wonder how an expert can predict with any fair degree of certainty how a market will react to the issuance of a debenture issue.

I don't think the experts can do it. All you have to do is follow events day by day here.

Don't do it through this witness, if you have any such purpose. The fact is that your adversaries have raised an issue that this was never encompassed in any other pleadings. That is the statment they made. Where in your complaint is there any such allegation?

MR. WEISS: We say that the prospectus--

THE COURT: Where in the complaint is there any allegation which would justify your inquiry along these lines? Your adversaries have raised this point in their answering brief that in your very wide-wheeling kind of brief, at least in the pre-trial order you made allegations that no where were adverted to in the pleadings.

MR. WEISS: Your Honor, we allege in the pleadings that the prospectus was misleading material, "misleading with respect to the following, among other things."

Now, when we get into these 10b-5 cases often these facts develop as we go along and we get into discovery and realize what the truth of the underlying

conditions were at the time of these wrongs. We are not privy to this information. We don't have people who were there on the spot. We have to develop this through discovery. It is not atypical. It happens in every case.

I mean, we have met 9b motions way up and down the line and the Court sometimes doesn't realize that the defendants put the clamp on information and the statute of limitations runs and--

THE COURT: I won't allow a statement like that to go by unchallenged and even though Mr. Gould is on his feet, I will answer it.

Typically with the ordinary process of pretrial discovery you probe and it is your duty to probe into every single, possible charge that has been made, and there have never been any restrictions nor is there particularly in these cases.

In fact, one of the reasons we get these thousands of pages of exhibits is exactly because that kind of discovery takes place.

We don't need any more statements of this kind. Let's get down to the issues as you defined them yesterday, which I understood were really directed at two items.

MR. WEISS: Your Honor, I would just like to

comment that we did discover these facts and we did put them into the issues in our pre-trial memo when we were requested to do it.

Do we have to announce five years or two years or six months in advance that--

THE COURT: I think your adversaries are entitled to notice so they can defend against the charge.

MR. GOULD: I think it is clear that this is an improvisation in the courtroom. We certainly have never heard of any allegation of a misrepresentation with respect to the price of these debentures. It has never been suggested to us in any way that that is one of the things on which he grounds his case.

In all these thousands of pages we can't find it here. I think it is something that just popped into his head in the courtroom.

MR. McAMIS: The reason that Mr. Day is having to say that he does not recall the answer to these questions this morning, your Honor, is that nobody ever asked him these questions.

THE COURT: How can you explain the reason why he gave an answer?

MR. McAMIS: What I am suggesting--

THE COURT: That is another item in this case.

Has every defense and plaintiff's counsel had his say on this subject?

MR. WEISS: Just one more thing.

THE COURT: Say your one more thing and then move along.

MR. WEISS: We went into this whole area through Mr. McDowell, who is vice president of Allen & Company. He testified that Mr. Day supplied him with the information upon which Mr. McDowell made these evaluations. It was gone into at length. I'm really a little bit surprised myself that the defendants can now contend surprise on this issue. All we have to do is look at the transcript of the McDowell deposition.

THE COURT: You have had your final say on that subject. Everybody else has. Please continue your examination of the witness and if you have no further questions, we will conclude his examination.

Q Just tell me approximately how many times you met or spoke with Mr. McDowell between August 5, 1968 and February 14, 1969.

A Probably in the nature of something like 10 to 20 times.

Q What was the subject of those conversations? Was there any one subject, or did you speak about many

things?

A Basically we were looking at--most of the conversations focused on a very limited time frame, I would say December 1st through December 30th. Basically it was on various types of packages which might be tendered for Armour securities, for Armour stock security packages.

Q That General Host had offered?

A Yes, that General Host--

Q Did you discuss the company, General Host, the operation of General Host?

A I'm sure to some extent we did.

B3 Q To what extent?

THE COURT: Mr. Weiss, I would assume that a company that is preparing a tender offer obviously is discussing almost every fact that is pertinent to the situation, the market as well as the tender of the company.

Why are we spending time on this? Won't you get down to specifics? I don't need a witness to tell me that. I think that corporate officers would be morons if they didn't discuss the matters.

MR. WEISS: I'm happy to hear your Honor say that.

THE COURT: You don't have to be happy to hear

it. That is a fact.

MR. WEISS: I believe it was Mr. McDowell's testimony that he didn't discuss--

THE COURT: This is the witness you have here now. Question him about his knowledge of facts that you were trying to develop.

MR. WEISS: I am trying to develop what he discussed with Mr. McDowell.

THE COURT: It will be hearsay as far as they are concerned. They are entitled to have an opportunity to cross examine. You have Mr. McDowell's deposition. Why don't you offer it? I'm sure that you plan to offer it.

No wonder you talk of cases taking four, five and six weeks.

Do you have further questions to put to this witness? If you have, please put them. Let's stick to relevant evidence.

MR. WEISS: I have tried to cut down a mass of material.

THE COURT: You did to a certain extent. I agree with you.

MR. WEISS: I have no further questions.

THE COURT: Mr. McAmis, do you have any ques-

tions to put to this witness?

MR. McAMIS: One question, your Honor.

XXX CROSS EXAMINATION

BY MR. McAMIS:

Q Mr. Day, on direct examination you were asked about the 9.4 million dollar insurance company loan and you testified that it was contemplated that payment of that loan would be made in August 1969 if the tender offer were successful. Do you remember that testimony?

A Yes, I do.

Q Was that fact disclosed in the prospectus?

A I believe it was.

Q Do you have a page number?

A No, I don't, but I guess I can find it.

Q Let me draw your attention to page 39, note 5 of "Notes to General Host Consolidated Financial Statement."

Note 5 is entitled "Long Term Debt."

A Right. Oh, yes, if I can read that note it says, pertaining to the insurance company note:

"In January 1969 the company entered into an agreement with the insurance companies under which the 5.25 per cent notes will be repaid on August 29, 1969 if the proposed exchange offer to the Armour stockholders is

consummated."

THE COURT: Where is that; page 39?

THE WITNESS: Note 5 at the very first paragraph under note 5, "long term note" on page 39.

Q Is there any other place, Mr. Day, where that disclosure is made in the prospectus? In that connection let me direct your attention to note 2 on page 13 of the prospectus.

A Yes, note 2 on page 13 reads:

"Notes payable to insurance companies bear interest at 5.25 per cent. These notes will be repaid in August 1969 if General Host consummates the exchange offer and it is presently anticipated that they will be refinanced at the company's present borrowing rate."

Q What was that present borrowing rate at that time; do you recall?

A I believe it was one above the prime rate.

MR. McAMIS: That is all.

MR. GOULD: No further questions.

MR. BROWN: No questions.

MR. DUFF: No questions.

THE COURT: Any redirect, Mr. Weiss?

MR. WEISS: No, your Honor.

THE COURT: We will take our morning recess.

(Recess.)

THE COURT: Call your next witness, please.

MR. WEISS: Your Honor, I will read portions of the deposition of Herbert A. Allen.

Page 571, line 5. This is February 12th.

"Q Aside from the ability to talk to the Armour management about permitting General Host to represent more than 50 per cent of the board, or to control more than 50 percent of the board, was there any other way that you contemplated General Host could achieve that result?

"Mr. Solovay: Do you mean at any time?

"Q Let us say within a year after the exchange offer was completed.

"A I would have assumed that they would have been able to win over a majority of the board itself once they attended meetings with the board or talked to them personally.

"Q On a voluntary basis?

"A Yes.

"Q If that couldn't be accomplished was there any other procedure that you were contemplating could be employed?

"A I didn't get into the legality of it, because

mpa2 "Allen-

the Host people weren't paying me for that, or hadn't paid me for that, and I am not a lawyer.

"On a business basis it is mostly common sense judgments that these people would have gone along.

"Q Were you aware prior to the -- prior to February 14, 1970, that the Armour, the majority of the Armour board was antagonistic to General Host?

"A I don't believe that that point had ever been established. Certainly not to me.

"I knew that the management was antagonistic but I didn't know the position of the board.

"Q Did you read the prospectus issued by General Host to the Armour security holders with respect to the exchange offer at the time it was filed with the SEC?

"A Yes, I did.

"Mr. Werbel: There are several prospectuses. Could we fix a date, please.

"Q Let us say the one that became -- the one that is dated January 30, 1969.

"A Yes, I did.

"Q Were you familiar with all of the contents of that prospectus at that time?

mpa3 "Allen

"A I don't understand the word familiar.

"Q Did you study it?

"A Yes, I studied the prospectus.

"Q Did you study all facets of it?

"A I read it thoroughly and I thought I understood it thoroughly.

"Q Were you also aware that Armour & Company, together with another individual had instituted an action against General Host, charging General Host directors and financial officers and dealer-managers with various conspiracies and acts in violation of the securities laws?

"A I was aware that they began a suit and I was aware that the suit was dismissed.

"I don't remember the date that it was dismissed.

"I am under the impression that it was dismissed before the registration became effective.

"Q You say you were aware that the action was dismissed?

"A I said I am aware that it was dismissed, yes. I am under the impression it was dismissed before the prospectus became effective."

Page 583, your Honor:

mpa4 "Allen

"Q Did you consider General Host's ability to get more than a majority control of the Armour board of directors an important fact in advising General Host on how to proceed?

"A When?

"Q Let us say between the time you were first retained as dealer-manager and the expiration of the exchange offer.

"A I didn't direct myself to the subject during the period of the tender offer.

"Q How about prior thereto?

"A Following the tender offer --

"Q I said prior.

"A Prior to the tender offer I was aware that Armour had a staggered board --"

I think he continues the answer at the bottom of page 585, line 23.

"A And that Host would have to deal with this problem accordingly.

"Q When you say it would have to deal with this problem accordingly, did you have anything in mind as to how it would proceed with the problem aside from discussions with management in trying to use persuasion?

"A I don't remember having anything specific

outside of what I spoke about during the period of this testimony this morning, the three or four things that I discussed with you.

"Q Did you seek any legal advice at that time concerning what steps might be taken through court action to achieve that result?

"A I believe I discussed it with Harris Ashton. I don't believe that I personally sought any legal advice with respect to the subject.

"Q What did you say to Harris Ashton and what did he say to you?

"A Roughly characterizing, I think I said that I assume that you will do whatever you can in order to deal with the problem.

"Q What did he say?

"A I don't remember his answer. I don't remember his disagreeing with that assumption.

"Q Did he say that he had something in mind as to how to deal with it?

"A I don't remember.

"Q Did you ask him what he had in mind?

"A I don't -- I don't recall if I did. I really thought that my theory, which was a business theory, which I had seen applied successfully recently, would

have sufficed, but I didn't really consider the staggered board a significant problem.

"Q You didn't consider it a significant problem with respect to achieving more than 50 per cent control?

"Mr. Solovay: At what time?

"Q Of the board of directors within a year.

"A That is correct.

"Q Because of this National General experience?

"A That was what was firmly planted in my mind. It seemed logical, given human nature as it is, that they would not want to sit on a board when they knew that the might be damaging someone sitting next to them on that board.

"Q Who are you referring to when you say somebody sitting next to them?

"A I am referring to those who were already on the board of Armour who would be joined by the new directors, the General Host designees.

"Q What interests are you referring to?

"A The interests of General Host's ownership of Armour."

Page 597, your Honor.

By the way, can we stipulate that Mr. Allen's

reference to the National General situation was that he had been involved in a proxy fight or an attempted takeover by National General of Great American in which there was a staggered board, and they worked it out by consent.

MR. DUFF: Not entirely, your Honor. National General Corporation made an exchange offer for the securities of Great American Holding Corporation and Allen & Company, Inc. acted as one of the two dealer-managers in connection with the exchange of secruities. I think I would be prepared to stipulate to that, Mr. Weiss.

MR. WEISS: I am talking about his prior testimony. We will have to go back and get it.

MR. GOULD: We can also stipulate --

MR. DUFF: We would also certainly stipulate that National Genetal Corporation did obtain a majority of the votes on the Great American board shortly after the exchange offer here.

MR. WEISS: And that is what he was relying on in his belief that there would be no particular --

MR. DUFF: That is one of the exchange offers with which he was familiar on which he was relying.

mpa8 "Allen

MR. WEISS: And that's the business experience on which he was relying.

MR. GOULD: Let me state this.

I will stipulate that when Mr. Herbert Allen was examined, he made reference to certain business experiences that he had with respect to exchange offers or other techniques for taking control of a corporation and that he referred to one of them, the takeover of Great American, and in Great American he, participating as a dealer, or his firm participating as a dealer-manager, had the experience that the board of directors of the target company resigned and in effect turned over control of the board to the National General people.

All right?

MR. WEISS: Yes.

MR. GOULD: So stipulated.

MR. MC AMIS: I agree, your Honor.

MR. WEISS: Page 563 of the transcript:

"Q When you stated previously that you didn't think that they would have, that General Host would have any difficulty being represented on the Armour board in any way they wanted, did you believe that to be true with respect to what General Host could accomplish at the next shareholders' meeting?

mpa9 "Allen

"A Could accomplish their desires, you mean --

"Q At the next shareholders' meeting.

"A I don't recall when I thought that they could achieve a 50 plus interest on the board, percent interest.

"Q You didn't give any considerationto that, to the time when it could be accomplished?

"A No, I didn't tie it into the shareholders' meeting.

"Q What did you tie it into?

"A Well, my theory on how I thought they were going to proceed?

"Q Sure.

"A I thought they would go to the management of Armour using them as the source of communication with the board, tell them what they wanted and that the Armour management would make it clear to those who were already on the board that General Host took this position and that it would be fair for General Host to have that amount of directors, and that it was in the best interest of the company and those directors to allow them to have that amount of directors.

"Q So you believed that that kind of dialogue and influence would create the result that you were

thinking about?

"A That is correct.

"Q Whom did you include in amnagement when you said you would go to management and have management discuss it with the directors?

"A The chairman of the board and/or the president. If they were one and the same, I don't recall.

"Q You don't separate persons who were on the Armour board and at the same time officers in your discussion, do you?

"A I don't remember now who was on the board.

"I was only thinking of the chairman or chairman and president.

"Q The chairman clearly was on the board; is that correct?

"A The chairman is usually on the board.

"Q So you are talking really of going to those management representatives who were also directors of Armour and discuss it with them?

"A No, I was more specific than that. I said the chairman and/or chairman and president. I don't remember who else was on the board. So I wouldn't remember whether or not they had executive vice presidents

Mpall "Allen

who were also directors.

"Q Did you give any consideration to what might occur in the event that they turned you down and said we don't buy your concept and we don't think it would be in the best interests of Armour to have General Host represent mnore than 50 percent of the directors of Armour's board?

"A I did personally, yes. I don't remember in what form I communicated that to General Host.

"Q What was your personal thought about that possibility?

"A Well, the most recent experience I had had with the situation of this kind was when National General took control of Great American Holding.

"They went in and made a similar request and made it very clear that it was in the best interests of the directors and of the company that those who owned the majority of the stock should be so represented.

"Usually that is enough to put the directors on the alert.

"I shouldn't say usually, but it had been my experience just prior to that.

"Q So you were relying upon the experience that you had in the National General-Great American situation;

mpal2 "Allen

is that correct?

"A That was the most important formative influence in my opinion."

Go to page 595:

"Q Did you discuss the question of General Host's ability to cause Armour to raise its dividend with counsel for General Host?

"A I don't recall discussing that subject.

"Q Do you recall having any discussions with Mr. Downey concerning that subject?

"A I don't recall having discussion with Mr. Downey.

"Q Did you have any discussion with Mr. Downey prior to February 14, 1969?

"A Yes.

"Q Concerning what subjects?

"A His brother, as I recall, was a prisoner in China. We discussed that subject.

"Q Relating to the General Host matters.

"A I'm sorry.

"We would have discussed any number of things relating to General Host. I don't recall specifically what I discussed with Mr. Downey over a period of years.

"Q Do you recall whether you discussed any

matters concerning General Host's legal ability to merge with Armour?

"A There were discussions held. I don't recall exactly when.

"There were discussions held.

"Q With Mr. Downey?

"A With Mr. Downey. I think with Mr. Ashton, and I believe with Alan McWowell and/or Charlie Lob of this office from time to time.

"Q Prior to February 4, 1969?

"A I believe so.

"Q When was the first such conversation that you can recall?

"A I don't recall the specifics.

"Q Was it in August of 1968?

"A I don't believe so.

"Q You don't recall any such discussions as early as August of 1968?

"A No, I don't.

"Q Or prior thereto?

"A That is correct.

"Q With anybody?

"A That is correct.

"Q How about September 1968?

"A I don't recall any. I think the -- rather than go through the monthly processes, itseems most logical to me that those discussions would have started sometime around the preparation of the prospectus, but I am not positive of that.

"Q Did you participate in the preparation of the prospectus?

"A Alan McDowell here did most of the preparation, the work that was Allen Company, Incorporated's jons.

"Q What portion of the preparationwas Allen & Company, Incorporated's job?

"A full review of the prospectus.

"Q That was part of what you were being compensated for, was it?

"A I would say that that was not why we were being compensated by General Host, no.

"Q Did you perceive it as part of your function?

"A I perceived it as part of our obligation, yes. I don't believe General Host paid us to read that prospectus.

"Q Did you consult with Mr. McDowell concerning the review of the prospectus?

"A Yes, I did.

"Q Did you discuss with Mr. McDowell what steps General Host might take following the exchange offer with respect to Armour?

"A We broadly discussed a wide range of possibilities, although it was very difficult to focus on anything specific because we didn't know where they stood with relation to their ownership in Armour prior to the completion of their successful tender.

"Q Was the amount of ownership something that was an important consideration in determining those future steps?

"A Yes.

"Q In what respect?

"A With respect particularly to the consolidation of the financial statements.

"Q What was required in your mind at that time to consolidate?

"A I don't remember what the rules were. I now associate it with 80 per cent in order to consolidate for tax purposes, although I think there's something around 66 or 67 percent also. I have forgottenwhat the particulars are.

"Q Aside from tax consolidation was there any other type of consolidation that you were concerned

with in your discussions with Mr. McDowell?

"A I believe there, was, but I don't remember what it was at the time.

"That relates to the 67 percent ownership. I have forgotten what the details were.

"The tax rules change every year. So I usually don't study them in detail unless there is a specific deal at a specific time.

"Q Again you are focusing on tax considerations when you use the 66 or 67 percent figures.

"A I was discussing that with relation to tax considerations and also the other financial considerations which would have allowed the two companies to unite.

"Q What were those?

"A I have forgotten now.

"Q When you say 'unit,' you mean to merge?

"A The possibility of merger, yes.

"Q As opposed to a consolidation for reporting purposes to stockholders?

"A I don't want to get too particular, because we are talking about something that is six years old and I have forgotten most of the details of it.

"You asked before whether or not, some ques-

tion relating financial consideration, and I said that those were the primary considerations that I had and the primary discussion that I had with Alan McDowell.

"Q Did you discuss with him what it would take, what percentage ownership by General Host of Armour would be needed to cause Armour to sell certain portions of Armour's assets?

"A I believe we covered that contingency, although I don't recall the specifics of any such discussion.

"Q But you recall discussing it?

"A I believe we covered that contingency.

"Q What do you mean that you covered that contingency?

"A That we covered all, almost all of the possibilities that could arise out of any General Host-Armour combination.

"Q And what it would take to cause that combination?

"A To do what?

"Q To combine the two companies.

"A Yes.

"Q You discussed all the requirements needed

to cause a consolidation or a merger of the two companies; is that correct?

"A I don't know if we did.

"Q You don't know if you did?

"A That is correct. I said we had extensive discussions. I don't know whether or not we covered every possible contingency.

"Q But youdiscussed contingencies?

"A That's correct.

"Q You discussed those matters in connection with your review of the prospectus; is that correct?

"A That is correct.

"Q Was there anything in the prospectus that was ultimately filed which became effective, filed with the SEC and which became effective that you felt needed clarification?

"A I don't recall."

That's all from Herbert Allen, your Honor.

MR. GOULD: If I may have a moment.

(Pause.)

MR. GOULD: I have nothing, your Honor.

MR. WEISS: Your Honor, I would like to offer Plaintiff's Exhibit 4 in evidence.

(Plaintiff's Exhibit 4 was marked for iden-

tification.)

MR. GOULD: May we just look at it, your Honor?

(Pause.)

MR. MC AMIS: Your Honor, I object to the receipt of this document as being -- It's an August, 1968 document, and I submit that there is not ever an offer to show thatthis was in any way connected with anything that was in anybody's mind during the period of time that's relevant to this case. Also, there's no showing that it ever came to the attention of General Host.

Mr.Allen and Mr. Paterson are both Allen people, and they -- apparently this was a memorandum between themselves, without any indication that it was ever seen by our clients.

MR. GOULD: My problem with this, I don't see that it has any probative value. I don't know what it has to do with this case. It's a memorandum as I get it, from Mr. Paterson, who was a partner or an officer of Allen & Company, Inc., to Herbert Allen, and he covers a lot of things that have got nothing to do with this case.

I have looked at it again to see if there

is anything here that relates to any of the issues. I don't find them.

THE COURT: If it doesn't relate to the issues, really what difference does it make, since I will only consider relevant evidence and material evidence? I haven't read it yet. I don't know, you may be right.

MR. GOULD: Really, I don't feel all that strongly about it. It is interesting, like reading a magazine, but it has no relevance.

MR. DUFF: We have no objection to it being introduced, but there's no relevance. It's a memorandum between one officer and another around that time.

THE COURT: Who is Gene Klein and Tom Evans?

MR. DUFF: Mr. Klein was chairman of the board and chief officer of General National Corporation. Tom Evans is the president or chairman of the board of Crane Company, whose stock is listed on the New York Stock Exchange.

I am reminded that there was a exchange offer in which the Crane Company and Westinghouse -- I guess it was Westinghouse Air Brake Company -- was involved in something previous to this. Those would be the

references to Mr. Patterson.

MR. BROWN: For the record, on behalf of Pistell I would like to join in the objection just raised.

(Pause.)

THE COURT: Was Mr. Allen or Mr. Paterson questioned with respect to this document?

MR. WEISS: What is that, your Honor?

THE COURT: Was either Mr. Allen or Mr. Paterson questioned with respect to this document?

MR. WEISS: There's a stipulation with respect to the authenticity. He was questioned in the SEC portion of the case.

MR. MC AMIS: I wasn't present at that, your Honor.

THE COURT: Pardon?

MR. MC AMIS: I wasn't in the SEC case, your Honor, at the time.

THE COURT: I take it that it really doesn't mean anything to me.

MR. WEISS: Your Honor, all it is being offered for is to show that Allen wasn't just a mere passer-by in this situation, that they were involved in it from the beginning, in August --

THE COURT: Well, you have his testimony on it. Didn't you just read in evidence his testimony and his relationship to this whole thing? Why are you cluttering up the record with this material? If you want to leave it in, I will take it in. Following my general principles sitting in a nonjury case, I will take in any matter and consider only what material is relevant and material.

What does it prove as far as this case is concerned?

MR. WEISS: Your Honor, I have no really strong feelings about it.

THE COURT: Well, it's up to you.

MR. WEISS: Then I withdraw it.

THE COURT: Are we still on this deposition?

MR. WEISS: No. I am going to go now to Mr. McDowell, Alan S. McDowell. I will start at page 100:

"Q Mr. McDowell, on page 226 of Exhibit 9 you testified in response to a Hearing Officers' statement, which read, 'Well, the thought would be Armour & Company wouldn't go bankrupt and they would still own Armour & Company. It would be just like transferring

from one whale to another whale.

"'People are controlling things.'

"And you said, 'But they are not free, as I understand it, to use assets of Armour & Company at this stage, are they?'

"Does that help you recollect that at the time you gave the testimony before the Illinois Securities Division that you were aware that General Host did not, was not free to use the assets of Armour & Company as it desired?"

MR. GOULD: I object to the question.

MR. MC AMIS: I object too, your Honor.

MR. GOULD: It is very obvious that when he responded at this stage to the hearing examiner he was talking about the date of his giving the testimony, and then there is an interpretation of it by Mr. Weiss which says it"was not free to use the assets of Armour & Company as it desired."

When?

MR. WEISS: Your Honor, this testimony was given by Mr. McDowell on February 19th, which was five days after the consummation of the exchange offer, and there was testimony before the Illinois Securities Commissioner, and I say, your Honor, that is state of

mind, just five days after the final date of the exchange offer is sufficiently close to the event to be probative.

MR. GOULD: I won't argue that, your Honor, but you have got to ask him a question that's calculated to get an answer that has some probative use and the way this is worded what comes back to you is of no use at all.

MR. MC AMIS: My objection, too, is that this is part of Mr. Weiss' direct case. I don't think he can bring in on his direct case something that he's apparently using in a deposition.

THE COURT: Is McDowell, a defendant in this case?

MR. MC AMIS: No, sir.

MR. WEISS: He is a vice president of Allen & Company, Inc. He testified -- this is the deposition of Allen, Inc., your Honor, by Mr. McDowell, and he is the gentleman that Herbert A. Allen testified he discussed the prospectus with and relied upon.

THE COURT: As you read it in, it doesn't really have very much meaning to me.

MR GOULD: That's right.

THE COURT: I will let it in, but I tell you now, it is unrelated to anything else. You

are just culling out some testimony that the witness gave.

I will let it in if you think it goes to his state of mind.

What else do you have?

MR. WEISS: Well, I want fo finish this line.

"A The testimony just stands on its own.

"Gentlemen, I did testify to that before the commission.

"Q Was it your belief at the time that they could not control the assets even though they owned more than 50 per cent of the outstanding common stock of Armour?

"A If you own 50 per cent of the --

"Q Were you aware at the time that you gave this testimony the fact that General Host owned 51 percent or more of the Armour securities -- of the fact" --

THE COURT: You are getting this all in that confused state. You asked one question up above.

MR. WEISS: I thought you wanted me to read the next question.

THE COURT: I don't want you to read anything, but you are jumping around now and I can't

follow you.

MR. WEISS: I am sorry.

THE COURT: The last answer the witness gave was from lines 3 to 5.

MR. WEISS: All right. We will go to line 14.

I think we have to start on line 6.

"Q Was it your beliefat that time that they could not control the assets even though they owned more than 50 percent of the outstanding common stock of Armour?

"Mr. Sullivan: Objection to the form in that that purports to ask the same question in a different way, because it is a very different question.

"Q That they could not use the assets of Armour?

"A If you own 51 percent of the stock of a corporation but do not control the majority of the Board of Directors you are not in a position to sell off the assets of that corporation, and even if you controlled a majority of the board you can't sell off assets to the other shareholders. That is my understanding anyway.

"Q Were you aware at the time that you gave this testimony of the fact that General Host owned 51 percent

or more of the Armour securities was not assurance that it could control the Board of Directors of Armour?

"A I would say that I was aware of it, yes.

"Q How did you become aware of it?

"A I don't recall."

On page 227 --

THE COURT: Incidentally, as I understand it, this testimony was given by McDowell as an officer of Allen & Company?

MR. WEISS: That's correct,your Honor.

MR. SOLOVAY: Inc., your Honor.

THE COURT: It's being received only against that defendant.

MR. WEISS: That's correct.

"Q On page 227 you stated,in part, 'Some other company that maybe has more aggressive or imaginative management, I am not making any representations here in that regard, the market speaks for itself on its price-earnings ratio, but management of General Host comes along and says to the Armour shareholder, okay, we will offer you a piece of paper whereby you will get on an annual basis interest which was more than you are getting as a dividend, considerably more in this case, and I will take over your company, and it

is my belief that with the people that we have and the ideas that we have that we can make that company move forward better than the present management that has demonstrated that it hasn't been able to do this very well.'

"Well, continuing, 'I will give you a debenture assuming that you can pay the interest, which is a question that has been dealt with at length here, but let's not dwell on it at this particular point -- we will pay you interest over a period of time. In addition, if we do the job the way we hope we can here is an option for stock in our company which you can exercise at your leisure over the next ten years.'

"Do you recall that testimony?

"A I reread it over the weekend, and I recall that that was my testimony, right.

"Q Was it your belief at the time you gave it? What I just read. Did you believe what you were testifying to at the time that you said it?

"A I think you have to put the testimony in context.

"The Hearing Officer, as I recall, had after all of the testimony of the various witnesses, had said, I am just a country boy and I don't understand what is

going on here, and explain it to me in layman's terms.

"That was my testimony that you just read, that was an attempt to respond to him and give the sort of general philosphy or approach that General Host was taking in regard to the offer to Armour shareholders. I mean, I don't want to add anything to that.

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"Q The approach as you understood it was, we are going to give you a debenture and an option on our stock, and give us control of the management of your company. Is that correct?

"A That's essentially--what I was attempting to do there was to reduce the offering, the terms of the prospectus to something that this gentleman said he could, or hoped he could understand.

"Q You were saying, were you not, that it was an important consideration that the General Host management would take over the management of Armour as a result of this exchange offer?"

Objection to form.

"Q Is that correct?

"A General Host, in their prospectus, said that they were going to move as promptly as possible to gain control of the company and--so I assumed that this was their objective. I suppose--well, you can't project the future. It was my feeling at that time that they had a reasonable chance to do that.

"Q A reasonable chance? That was your feeling, that they had a reasonable chance to do it?

"A In my general experience as an investment banker when a company is able to control or to purchase

51 per cent of another company they are normally over a period of time able to exercise control over that company's affairs.

"Q Now you are saying normally over a period of time. Is that what you believed at that time?

"A I didn't know at that time how they would achieve their staced objective in the prospectus to gain control and a majority of the board, but it was my general feeling that they would be able to do it in one fashion or another, whether through negotiation with the Armour board members or the Greyhound stockholders, or there's any number of things that they might have been able to do to achieve their objective.

"Q Did you realize that from a legal standpoint they couldn't automatically achieve control at the next meeting of the shareholders of Armour?

"A If all of the shares other than their own were voted for nominees other than theirs, and if all of the Armour directors who were not up for re-election continued their opposition to General Host, they would not have the majority of the board of directors in favor of their programs or plans at that time, obviously.

"Q And you knew that at the time that you testified?

"A I assume I did, yes.

"And I knew that at the next meeting of Armour which was, I guess, a couple of days later, the annual meeting, that six of the 17 directors, I think that is the number, were up for re-election and that the others were not, and that, therefore, Host would be able to elect at most those six directors as their nominees and perhaps less, depending upon how the other people voted."

MR. WEISS: That is all, your Honor, from that deposition.

THE COURT: You want to read anything, Mr. Gould or Mr. McAmis?

MR. McAMIS: May we have a moment, please?

(Pause.)

MR. GOULD: If your Honor pleases, in view of the way this has come in,will counsel stipulate that McDowell, whose testimony was just read, was a graduate of Harvard Business School and of Princeton University; that he had majored in finance and marketing and that he had had a good many years of experience in the investment banking field, and that since 1967 he had been engaged in working at Allen, Inc. in the underwriting department?

MR. WEISS: I will stipulate that he was the

most sophisticated investment analyst that one could be.

MR.GOULD: I don't know that I ask that stipulation. It is just that I asked for a stipulation that he went to those schools and he had that experience.

MR. WEISS: Fine.

THE COURT: Proceed.

MR. WEISS: Just for clarification, I'm not sure I understood your Honor's opening comments about the Allen Company-Allen Co., Inc. relationship.

Was your Honor suggesting that your prior findings would be so held here?

THE COURT: No. I thought it was clear why I made the reference. All defendants, including the two Allen defendants, had waived trial by jury in this case. It had been scheduled as a jury trial. I just wanted to make sure that the lawyers representing Allen & Company presently in this matter are aware of the fact that there was some issue in a prior case where I sat without a jury and made a fact finding with respect to that matter.

The fact finding was contrary to the position taken by the Allens in that circumstance. If the defendants desire to withdraw their waiver of trial by jury, I was prepared to allow them to withdraw it.

MR. DUFF: We stipulated, your Honor, that we

did not so desire.

THE COURT: But each case would be determined upon its own facts.

MR. DUFF: Thank you, your Honor.

THE COURT: The disposition I made of the disputed fact issues in that case have no bearing in this case.

MR. DUFF: Thank you, your Honor.

MR. WEISS: I would like to offer in evidence Plaintiff's Exhibit 59, which is a letter from Allen & Company, Inc. to the board of directors of General Host Corporation dated October 15, 1969.

MR. McAMIS: Objection, your Honor, as having no probative value to the issues in this case and being more than ten months or approximately ten months subsequent to the date of the prospectus that is the subject matter of this action.

MR. GOULD: I join in that. I can't see how this could affect--

THE COURT: The opening paragraph of 59 reads:

"We have been asked to give an opinion as to the probable value of the package of cash and securities offered to General Host by Greyhound Corporation in exchange for 3,650,000 shares of Armour presently owned by

Host."

This is October, 1969.

MR. WEISS: Yes, your Honor. Will you please look at page 3 starting with the last paragraph?

MR. GOULD: I think it is so remote from the events under consideration that it has nothing to do with this case.

MR. WEISS: May I state why I believe it should be admitted?

THE COURT: I will receive it only as against Allen & Company simply with respect to the claim as to alleged lack of control and possible impact on the value of the stock.

Again I say you don't need an expert to express an opinion on that.

MR.DUFF: I would just suggest that the date written on the letterhead of Allen, Incorporated and signed by Mr. McDowell as vice president of Allen & Company, Inc. so that--

THE COURT: It is received only with respect to Allen & Company, Inc. and only that portion of it.

MR. DUFF: Thank you, your Honor. This was submitted to the General Host board of directors pursuant to a retention by Allen & Company, Incorporated to prepare

this report and it is as justification for the sale of the block to Greyhound.

MR. WEISS: I just think that it should be admitted as to General Host.

THE COURT: Then supposing they gave the different opinion and praised it to the skies. You would be the first one to object to its admissibility.

MR. WEISS: I will leave it as against Allen, Incorporated, then

B2 MR. GOULD: Just so I understand it. I am not arguing the ruling; I am just a little confused. Here is a letter written in October 1969 and the part that your Honor adverts to starts with the language, "There are several conditions which make the offer attractive to Host at this time."

I am emphasizing the words "at this time." This is ten months, nine months after the event that we are concerned with.

As I understand, your Honor is receiving this as having some evidentiary value with respect to Allen, Incorporated's understanding of the control issue.

THE COURT: Yes, Mr. Gould, it is very simple. A battle for control of the corporation never helps the corporation.

MR. GOULD: I will agree to that.

THE COURT: Do you need an expert for that?

MR. GOULD: No, sir, I don't. I'm an expert on that. I agree.

MR. WEISS: It shows the materiality of the omissions in the prospectus as alleged by the plaintiffs.

THE COURT: That is your statement.

MR. WEISS: That is one of the reasons why I am offering it.

THE COURT: I don't accept that as such. That is your statement. That isn't what he said there at all.

MR. WEISS: It also shows the causal relationship.

THE COURT: It is an opinion with respect to the value of the stock and arrangement as of a given day nine months after the event. Why are we spending so much time on it? The essential elements have to be determined as of the time of the occurrence of the events based upon all the surrounding facts and circumstances in existence at that time, not hindsight judgment expressed nine months thereafter, which isn't even judgment with respect to the original events which are the subject matter of this action.

I have received it limited to one of the

defendants. Let's move on, can't we?

XXX (Plaintiff's Exhibit 59 received in evidence.)

MR. WEISS: I offer Plaintiff's Exhibit 15, your Honor.

MR. McAMIS: I object to receiving this on the ground that it really goes to the issue of original issue discount which I objected to earlier this morning.

MR. WEISS: I am offering this for a different purpose.

THE COURT: Pardon.

MR. WEISS: I am offering it because it is on the letterhead of Allen & Company, your Honor.

MR. GOULD: It is not so, Mr. Weiss.

MR. WEISS: The copy that I have.

MR. GOULD: Here is your copy that you handed me and it ain't so. It is not on any letterhead.

THE COURT: I still don't have all the exhibits. Where is the exhibit that the witness Day testified to?

Gentlemen, I think you are arguing as to an exhibit already in evidence. Was this exhibit offered when Mr. Day testified this morning, Exhibit 39? Was this received in evidence this morning?

MR. WEISS: No. Let me explain what the problem is. Apparently there are two different versions of

this letter floating around, both of which appear to be signed by Mr. Glynn and one of which--

MR. McAMIS: Not Mr. Glynn.

MR. WEISS: I'm sorry, by Mr. McDowell. They were clearly written on different typewriters, at least to my eye. One is on the letterhead of Allen & Company and the other one is on the letterhead of Allen & Company, Incorporated.

I am introducing the one that has Allen & Company on top.

MR. GOULD: I press my objection to that. Mr. Weiss has now added to his area of expertise. I only see one on a letterhead. On the document that was offered to your Honor somebody unidentified has written the words "Allen & Company" up at the top. That is not a letterhead in anybody's vocabulary. Now there is a copy of the letter which is produced by Mr. McAmis which has a letterhead on it and it was apparently received by Mr. Glynn. That is the letter--

THE COURT: Is there any reference in the pre-trial order to this document?

MR. GOULD: In item 15 in the pre-trial order they designated a letter from McDowell to Glynn dated December 20, 1968, but, of course, we would have assumed

that he was talking about this letter with a letterhead on it and which is the letterhead of Allen & Company, Incorporated.

MR. WEISS: Every document we have in this case we got from the defendants in one way or another. We didn't create them.

THE COURT: What is the problem now?

MR. GOULD: He said, your Honor, that he is offering the--

THE COURT: Which one are you offering?

MR. WEISS: I offered the one with Allen & Company on top, your Honor.

MR. GOULD: Handwritten. I object to it. There is no foundation. That is not a copy of the letter. Here is the letter (indicating).

MR. BROWN: I think I can clarify this. One of the letters with Allen & Company on the top, handwritten, has "file" with an arrow. I think this letter might have been produced by Price, Waterhouse during Mr. Bettauer's examination, the Price, Waterhouse people just indicating those are the Allen & Company file, but the letter is still objectionable because it goes to the same issue about the debentures which we objected to on a prior document before.

MR. McAMIS: As your Honor will note on the bottom there is a notation that a carbon copy was sent to Bettauer and the document plaintiff has produced--

THE COURT: One at a time. Mr. Gould, which one are you offering, the one that has the printed "Allen & Company, Incorporated," which is a letterhead as we understand that term, or are you offering the one that doesn't have Allen & Company?

MR. WEISS: I don't want to make a big issue of this. I withdraw the--

MR. GOULD: The only difference--

THE COURT: Why don't you let him finish?

MR. WEISS: I didn't realize there was another one. The only one I had in our files was the one I offered to your Honor. There are two versions.

As far as I'm concerned, it is not important.

I would like to just put in three pages of a transcript of a deposition of Allen S. McDowell taken in the Armourand Kaye case. It was an examination by Mr. McCrate of Sullivan & Cromwell and I will read it in.

MR. GOULD: Just bear with us a moment while we get it out.

MR. McAMIS: Could I inquire whether the document you put it is being put in for the truth of what it

is stated or limited to the fact that this deposition was taken and that those questions and answers were asked and given?

MR. WEISS: I would like to put it in for the truth of what was stated.

MR. McAMIS: What pages are involved?

MR. WEISS: Pages 8 through 11.

MR. GOULD: I understand that counsel is now offering in evidence pages 8 through 11 of a deposition.

THE COURT: I thought you read from McDowell's deposition, didn't you?

MR. WEISS: From the one that was taken in this action. The one I'm talking about is the one that was taken of Mr. McDowell in the action started by Armour in which you ruled on the injunction motion.

B3 MR. McAMIS: This is the 1969 deposition matter. That is why I am objecting. This is the 1969 matter.

MR. WEISS: To show the relationship between Allen & Company and Allen & Company, Inc. is my purpose.

THE COURT: Mr. Weiss, I don't understand, then, your offer, for this reason: This pre-trial order has extensive stipulated facts with respect to the relationship between Allen & Company, the partnership, and Allen & Company--

MR. DUFF: Allen & Company, Incorporated.

THE COURT: What does that add to it? I had assumed that you got every single fact that was pertinent on the issue of relationship.

MR. WEISS: No, your Honor, because they wouldn't stipulate to what I am going to read now. I thought--

MR. GOULD: I never heard a discussion about this.

MR. DUFF: It was not discussed.

MR. WEISS: This was a designated document.

MR. GOULD: It is not true. Mr. Weiss designated a document which was a big fat document, so I objected to it.

Now apparently he has got three pages in mind.

MR. WEISS: Why don't you look at page 9, lines 11 through 23.

MR. GOULD: All of the material up to that is material that is already in.

MR. WEISS: I just narrowed it down.

MR. GOULD: Now we come to the point that he is interested in and there is a characterization and an answer in another case by McDowell and I don't think this is the way to do it. I don't think it is admissible.

THE COURT: I haven't looked at it, but if it is what I think it is, Mr. Weiss, I'll receive it as an admission against interest on whosever behalf he was testifying, and for that limited purpose.

MR. GOULD: Allen Incorporated.

MR. DUFF: I think there may be a typographical error on transmission or it may have been inaccurate. It was irrelevant at that time, but could you read in the portion that you have in mind, Mr. Weiss, because I think the transcript was just in error if it refers in a certain way to a certain purpose.

MR. GOULD: There is no problem about who he is acting for. He describes him as a vice president of Allen & Company, Incorporated.

Then he goes on--

THE COURT: Whatever probative value it has it will be received as against Allen & Company, Incorporated, as I have indicated.

MR. DUFF: Your Honor, it is in conflict, I believe with the stipulated facts. I would like to draw Mr. Weiss' attention, if he is referring to the top of page 9, to the relationship of Mr. Charles Allen as a stockholder of Allen & Company, Incorporated.

The stipulated facts are that he was never a

stockholder at any time with Allen & Company, Incorporated, so if it is in conflict with the stipulated facts we would like to direct your Honor's attention to the stipulated facts.

MR. GOULD: It has been stipulated that Charles Allen is a director --

MR. DUFF: No, it has not. This is why this is inaccurate.

THE COURT: It looks as though you gentlemen can't agree between yourselves.

Whom do you represent, Mr. Duff?

MR. DUFF: I represent Allen & Company, your Honor.

THE COURT: The partnership?

MR. DUFF: Yes.

THE COURT: Mr. Gould represents Allen Company, the corporation?

MR. DUFF: Yes, sir, so I can tell you that Mr. Charles Allen is a general partner of Allen & Company.

THE COURT: But he is not a director of Allen & Company, Inc.?

MR. DUFF: That is right. He is not a director during the relevant periods of time.

THE COURT: And the witness Day testified that

he was?

MR. DUFF: Yes. I'm just reading it now and it is either the witness--the witness says, "He is director, stockholder, major stockholder," and then he goes ahead and says, "He is also, I guess, senior partner of Allen & Company."

This witness apparently was not aware of whether or not he was a stockholder, but, in any event, he is not a stockholder, he was not during relevant periods a stockholder, director or officer of Allen & Company.

MR. WEISS: He is talking about Charles Allen.

MR. DUFF: That is correct.

MR. WEISS: In other words, this witness is testifying that he didn't know who was--that they were altogether mixed up in one place and he didn't know who was the boss or--

THE COURT: That is your conclusion again. I told you not to state a conclusion before. I ask you not to state conclusions and don't state ultimate facts that you base upon what you believe were established facts and draw the inferences.

The fact finder is supposed to do that. You may argue it later on.

MR. WEISS: I apologize, your Honor.

MR. DUFF: Your Honor, we are perfectly willing to abide by the stipulation of facts that we agreed to with Mr. Weiss in the pretrial order.

THE COURT: Well, Mr. Weiss goes beyond that and he is offering the deposition, which you say has a contradiction with respect to a stipulated fact. I think you are making much out of little, really.

MR. DUFF: Yes, your Honor.

THE COURT: I suppose lawyers sometimes get paid or that too.

Now, what else do you have?

MR. WEISS: Can I have a five-minute recess? I think we might be near the end, your Honor.

(Recess.)

THE COURT: All right, Mr. Weiss.

MR. WEISS: Your Honor, I would like to put into evidence in this case the answers to interrogatory No. 1 by Allen, Inc. in the SEC action, which sets forth the compensation that Allen, Inc. received from General Host with respect to this exchange offer and the other relationships it had with General Host, preceding and subsequent to the event.

MR. MC AMIS: Objection as to relevance and also it is not binding on my client.

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THE COURT: I take it you are offering it only against Allen, Inc.?

MR. WEISS: That's correct.

MR. MC AMIS: What's the relevance?

THE COURT: I don't know, but bear in mind my ruling that I will consider only relevant material.

MR. GOULD: May I make a half-hearted objection, your Honor?

THE COURT: In the first place, I thought there was a stipulation about that, the amount of compensation. Isn't that in the pretrial order, Mr. Weiss? If it isn't in the pretrial order, why do you need to put it in through this stuff?

MR. WEISS: It also demonstrates the close relationship between Allen, Inc. and General Host, your Honor. They acted as underwriter for General Host with respect to the Uncle John Restaurants, Inc. rights offering, received $101,000 --

THE COURT: They also made a private placement for them and they were compensated for that?

MR. WEISS: Yes.

THE COURT: Is there any serious question that there was a relationship between them? The very fact that they were engaged in this matter would suggest

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that. I wouldn't imagine that an issuer would engage a dealer-manager unless he had some confidence in him and usually prior experience.

I think you are belaboring an unnecessary point here, but I will receive it.

MR. WEISS: Well, I would like to put it in.

THE COURT: I am suggesting to you that you have this in the record already.

MR. WEISS: I appreciate that, but you also made a statement about relevance, and at the end, when I put in all my documents, I will explain what the relevance is -- my position --

THE COURT: All right. This is with respect to?

MR. WEISS: Allen, Inc.

I have reconsidered, your Honor, Plaintiff's Exhibit 4, which I offered before and you said you would accept for whatever value it has. I would like to reoffer it, so that it's in the record. It's Exhibit 4.

MR. MC AMIS: I renew my objection on the grounds stated, your Honor.

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THE COURT: Well, you aren't in this part at all. This is, as I understand it, an interoffice communication.

MR. MC AMIS: As I understood your Honor's previous ruling, it wasn't going in against my client.

THE COURT: Then why are you objecting?

MR. MC AMIS: I just want to make sure my understanding is correct.

THE COURT: All right. Received only as against Allen, Inc.

(Plaintiff's Exhibit 4 was received in evidence.)

MR. WEISS: Your Honor, in Mr. Gould's opening remarks he made a statement that nowhere could be found any other prospectus that did something as we were urging should have been done in this case during that same period.

We have hurriedly made a search for something similar, and we found one that is a prospectus dated January 24, 1969, that was used in connection with an exchange offer for common stock of Sharon Steel Corporation by NVF Company.

The first thing that's evident about it is that there is a sticker on it, which means that if

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something comes to the attention of the company that's --

MR. GOULD: I don't want to interrupt, but testimony is supposed to be testimony.

THE COURT: Please don't interrupt. When he finishes his statement you may interrupt.

MR. WEISS: -- to the company that's issuing the prospectus that a sticker can be placed on the front of it and added for dissemination to the shareholders to whom it is directed, and this particular one evidences the fact that the debentures being offered are being traded on a when-issued basis at a price beloe the price stated in the prospectus -- the face value of the debenture. But in addition, at page 9, the following appears:

"NVF has no present plan for reorganization or any other change in either its own existing corporate structure or that of Sharon. After the exchange offer, NVF expects to invite representatives of NVF's management to serve on NVF's board of directors and to invite Sharon's directors to remain as members of an enlarged Sharon board. The ability of NVF to enlarge the Sharon board will depend on the extent to which the exchange offer is accepted, but as noted above, since Sharon's stockholders are entitled to cumulative voting

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rights, NVF's representation on the Sharon board may not be directly proportionate to the extent of its equity ownership in Sharon."

Now, this appears, your Honor, on page 9 under "Background of the exchange offer," and since -- and, incidentally, the information concerning NVF -- the information concerning Sharon is also in the back of the prospectus. Since Mr. Gould has called upon us to evidence to him what another company might be doing under a similar tupe of situation in the same time period, we would like to offer this in evidence..

MR. GOULD: Well, I don't know, your Honor. It's not evidence of anything. This is like telling me your wife ain't beautiful because I know another beautiful woman. By the way, her name was Cleopatra and she died 2000 years ago.

THE COURT: Well, he is offering it on the basis on which you challenged --

MR. GOULD: I didn't challenge him.

THE COURT: There was a question of whether the other defendants should bear the burden of Mr. Gould's exuberance.

MR. GOULD: Well, I stand on my statement. Now, if he wants to give me a witness who is going to

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say that he knows about other transactions to prove me wrong, I will be delighted to deal with that witness, but his name isn't going to be Mr.Weiss.

MR. MC AMIS: I object to its receipt too. I have enjoyed the eloquence, but I object to the receipt of the document.

MR. WEISS: Your Honor, it seems to me that each prospectus has to be looked at as an individual document and I think that this court has to determine as the finder of fact --

THE COURT: You definitely are arguing against its submission. You just want to show Mr. Gould that he isn't always right.

MR. GOULD: But he hasn't done it. I am the first to concede that I am not always right, but this doesn't make it so.

THE COURT: All right, the objection is sustained.

What else do you have?

MR. WEISS: That's it, your Honor.

Plaintiff rests its case, but I would like to just bring to this court's attention the recent decision of the Second Circuit, which was decided on April 11, 1975, entitled "Chris-Craft Industries, Inc. vs. Piper

mpa8

Aircraft Corporation."

This is the decision, your Honor, increasing --

THE COURT: I saw it in the Law Journal. That's on increasing the damage. I haven't seen it yet. The slip sheet hasn't come down.

MR. WEISS: I will give it to your Honor.

THE COURT: How did you get a slip sheet? Have you got a special service?

MR. WEISS: We try harder, I suppose.

At page 2838 the court says:

"With respect to First Boston we held that the material defenses in BPC's registration statement and prospectus also provided the basis for Section 14(e) liability on the part of First Boston" --

THE COURT: Pardon my interrupting your reading. First Boston was an underwriter. Does that make any difference here?

MR. WEISS: It was also a dealer-manager in that situation. It was both.

THE COURT: Well, as I recall, the original opinion it was concentrated on the underwriting responsibility. I may not -- that's my recollection of it. I am not talking about the slip sheet that you have in your hand but the original opinion.

It seemed to me the great emphasis was on the responsibility that the underwriter had to the public.

I am simply asking you does the same document appear in the instance of a dealer-manager?

MR. WEISS: I would strongly argue that it does, because if you take a look at the compensation that was being paid and the functions that were being performed, the fact that its name appears on the cover of the prospectus and it is called a prospectus, clearly the obligations arise by virtue of the public's reliance upon the functioning of the dealer-manager in that capacity.

You see, your Honor, I think what's really happening is that although White against Abrams was decided in the Ninth Circuit, that the thinking of White against Abrams, which adheres to a flexible duty standard, is really being absorbed by the other courts, although maybe not spoken in terms of White against Abrams.

What the court seems to be saying is: Let's look at whom we are dealing with. Let's see what the nature of the duty of that defendant is, how much he stands to gain from the transaction, his relative

proximity to the truth and the facts, as compared to the plaintiff in the case, and we will set a standard of duty for each individual on that basis. And if we talk about recklessness it's because it is based upon the particular individual that we are talking about. Clearly an experienced broker-dealer-investment analyst has to conform to a higher degree of care than a lay person, particularly when we are dealing with a situation such as we have in this case.

The Second circuit in the Chris-Craft decision slips in and out of language that clearly can' be said to mean only recklessness in the commonly understood phraseology, because if you take a look at the decision, when they talk about First Boston, after having set up the so-called standards for liability, they refer to the negligence being charged against this defendant.

On page 373:

"Since failure to disclose was an omission, the next question is whether such omission was relied upon. It is important to note that since the harmful effects of the negligence in this case did not depend on the exercise of volition by CCC" -- et cetera. In other words, it talks about negligence at that

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point.

If you read the language of the April 11th decision, the court states:

"First Boston had not adequately performed its duty in failing to make a reasonable further investigationinto the BAR matter when it was aware of facts that strongly suggested that the BBC registration materials were deceptive."

That's closer, it seems to me, to a negligence standard than a recklessness standard, but they are measuring First Boston as an experienced underwriter, an experienced dealer-manager, and it did in this situation.

Perhaps a fact such as the ones that we are alleging were omitted or misstated in this case might not be as acutely -- might not have acted as a warning signal to a lay person, but to a professional in this field, whose job it is to inform the public, they had the knowledge that should have put them on guard and should have caused them to be far more alert to this.

THE COURT: What do you say was the duty owing by a dealer-manager to an investor?

MR. WEISS: A dealer-manager, your Honor, supervises the solicitation of tenders. The under-

writer sells stock. The dealer-manager solicits stock. They are both purchases and sales --

THE COURT: I am asking you, what's the duty to the investor on the part of the dealer-manager?

MR. WEISS: The duty to the investor it seems to me is to insure that the prospectus being issued with its name on it is not materially false and misleading and it should exercise due care --

THE COURT: You are putting the dealer-manager in the same category with an underwriter?

MR. WEISS: Yes, I do.

THE COURT: As far as duty is concerned?

MR. WEISS: That's correct.

MR. GOLDSCHMID: May I address myself to that, your Honor?

THE COURT: Have you finished on that point?

MR. WEISS: Yes.

MR. MC AMIS: Your Honor, on behalf of the defendants I represent, now that the plaintiff has rested, I have two motions to make, a motion to strike certain evidence and a motion to dismiss on the ground that the plaintiff has completely failed to establish a prima facie case in this action.

In view of the hour, your Honor, could you indicate whether you want me to make my argument now or after lunch.

THE COURT: That all depends on how much time you want, because I have motions this afternoon and there is such a thing as once in a while a judge is entitled to lunch between a morning and an afternoon session too.

MR. MC AMIS: I agree, your Honor, and in all candor I think it is going to take me some time to make my points, at least as long as my opening yesterday, about 20 minutes or so.

THE COURT: And Mr. Gould, how long will you take?

MR. GOULD: About 20 minutes.

I would like to make a suggestion, maybe to promote everybody's convenience. We had not anticipated that the plaintiff would rest as promptly as he has. Since your Honor has motions this afternoon, I would suggest that we go over until tomorrow morning.

THE COURT: I was going to make that announcement regardless of what happened, because I got the time estimate on my motions and I would do very well if I hear the motions within three or three and a half

hours this afternoon, and I think there are three rather substantial injunction motions on these actions.

Would you rather go over until tomorrow morning and make your motions then, and without anybody anticipating the results, I would assume that in the event that I should deny the motions, to be prepared to go forward?

(Adjourned to April 16, 1975, at 9:30 a.m.)

STATE OF NEW YORK)
} ss.:
COUNTY OF NEW YORK)

NANCY A. LAMPEDUSA, being duly sworn, deposes and says that she is in the employ of Milberg & Weiss, attorneys for the within named Plaintiff herein, and is over the age of 21 years. That on the 23rd day of December, 1975, she served the within JOINT APPENDIX VOLUMES I, II, III, and IV

upon the attorneys for the respective parties named below, by depositing a true copy of the same to each of them, securely enclosed in postpaid wrappers in a post office box regularly maintained by the United States Government at One Pennsylvania Plaza, New York, New York 10001, directed to each of them at their respectfully addresses set forth below, those being the addresses within the State designated by them for that purpose on the preceding papers in this action, or the places where they then kept their respective offices between which places there then was and now is a regular communication by mail:

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Nancy Lampedusa

Sworn to before me this
23 day of December, 1975

Flora E. Cave

Notary Public

FLORA E. CAVE
Notary Public, State of New York
No. 24-0605450
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1977